

MAR 20 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

NOS. ~~77-1164~~ ⁷⁷⁻¹¹⁶³ & 77-1186

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN,
O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W.
DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their
official capacity as members of THE TEXAS OPTOMETRY BOARD;
and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellants

v.

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually
and as President of the TEXAS SENIOR CITIZENS ASSOCIATION,
PORT ARTHUR, TEXAS CHAPTER,
Appellees

**On Appeal from the United States District Court
for the Eastern District of Texas
(Three-Judge)**

MOTION TO AFFIRM

Of Counsel:

MEHAFFY, WEBER, KEITH
& GONSOULIN
Beaumont, Texas
DAVIS & DELEON
Austin, Texas
VICTOR J. ROGERS, II
Houston, Texas

Counsel of Record:

ROBERT Q. KEITH
MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST

Attorneys for Appellees

SUBJECT INDEX

	Page
Motion to Affirm	1
Opinion Below	4
Jurisdiction	4
Statutes Involved	4
Questions Presented	5
Statement of the Case	6
Argument and Authorities	12
I. The District Court correctly determined that the First Amendment is violated by a statute prohibiting licensed Texas Optometrists from practicing under, or using in connection with their practices, any trade name, corporate name or assumed name.	12
A. Generally.	12
1. The Statute and its History.	12
2. The Approach of the Court Below.	17
B. The Court below was clearly correct to apply the First Amendment "Balancing Test".	19
1. Commercial Content—Not "Conduct".	19
2. Today's Constitutional Approach.	20
3. The "Balancing Test" Fits.	22
C. The Court below struck the correct "Balance"....	23
1. What Is and Is Not at Issue Herein?	23
2. The Unconstitutionality of the Trade Name Ban Follows Directly from This Court's Decisions in the Advertising Cases.	37
3. The Insufficiency of the Carp Case as Justification for the Trade Name Ban.	53
4. The Blanket Trade Name Ban May Not Be Justified as a Mere Time, Place or Manner Limitation on Free Commercial Speech.	54

II

II. The Injunction and Orders Pendente Lite entered by the District Court present no barrier to Summary Affirmance.	Page 57
Conclusion	65
Certificate of Service	66
Appendix A (Portions of Texas Optometry Act)	A-1
Appendix B (Orders Pendente Lite of the U.S. District Court, Eastern District of Texas, Beaumont, dated February 16, 1976)	B-1

LIST OF AUTHORITIES

CASES

Adderly v. Florida, 385 U.S. 39 (1966)	Page 55
Alexander v. Hillman, 296 U.S. 222, 239, 56 S.Ct. 204, 209-210 (1935)	60
American Steel Foundries v. Robertson, 269 U.S. 372, 380 (1926)	47
Bates v. State Bar of Arizona, ____ U.S. ____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977)	Cited throughout
Beer Nuts, Inc. v. King Nut Company, 477 F.2d 326, 328 (6th Cir. 1973)	48
Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L. Ed.2d 600 (1975)	10, 19, 21
Brandenburg v. Ohio, 395 U.S. 444 (1969)	20
Breard v. Alexandria, 341 U.S. 622 (1951)	21
Camp v. Boyd, 229 U.S. 530, 552, 33 S.Ct. 785, 793 (1913)	61
Cantwell v. Connecticut, 310 U.S. 296 (1940)	20
Carey v. Population Services International, ____ U.S. ____, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977)	19, 20
Cohen v. California, 403 U.S. 15 (1971)	20
Cox v. New Hampshire, 409 U.S. 109	55
DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499 (1st Cir. 1975)	18
Elam v. United States, 250 F.2d 852 (6th Cir. 1958)	8
Elrod v. Burns, 429 U.S. 347 (1976)	16
Fey v. Walston & Co., Inc., 7 Cir. 1974, 493 F.2d 1036, 1050	62
Gold Seal Co. v. Weeks, 129 F. Supp. 928, 934 (D.D.C. 1955), affirmed 230 F.2d 832 (D.C. Cir. 1956)	49

III

Gragned v. City of Rockford, 408 U.S. 104 (1972)	Page 55
Green v. Connally, 330 F. Supp. 1150 (D. D.C. 1971, Three-Judge Court), <i>aff'd sub nom.</i> Coit v. Green, 92 S.Ct. 564 (1971)	58
Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413 (1916)	47
Kovacs v. Cooper, 336 U.S. 77 (1949)	55
Linmark Associates, Inc. v. Township of Willingboro, ____ U.S. ____, 97 S.Ct. 1614, 52 L.Ed.2d 159 (1977)	Cited throughout
Longbottom v. Swaby, 5 Cir. 1968, 397 F.2d 45	62
Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U.S. 203, 205 (1942)	48
NAACP v. Button, 371 U.S. 415 (1963)	20
Patterson Drug Co. v. Kingery, 305 F. Supp. 821 (W.D. Va. 1969)	17
Pittsburg Press Co. v. Pittsburg Commission on Human Relations, 413 U.S. 376 (1973)	27
Prestonettes v. Coty, 264 U.S. 359, 369 (1924)	49
Smith v. California, 361 U.S. 147 (1959)	20
Smith v. Chanel, Inc., 402 F.2d 562, 569 (7th Cir. 1968)	49
Solesbee v. Balkcom, 339 U.S. 9, 11 (1950)	58
Stone v. Farnell, 239 F.2d 750 (9th Cir. 1957)	8
Texas State Board of Examiners in Optometry v. Carp, 412 S.W.2d 307 (1967)	Cited throughout
Thornhill v. Alabama, 310 U.S. 88 (1940)	20
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	20
Toyosaburo Korematsu v. United States, 323 U.S. 214, 222 (1944)	58
United Drug Co. v. Theodore Rectanus Co., 248 U.S. 90, 98 (1918)	47
United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 581 (1971)	57
Valentine v. Chrestensen, 316 U.S. 52 (1942)	21
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976)	Cited throughout
Wallin v. Fuller, 5 Cir. 1973, 476 F.2d 1204	62, 63
Whitney v. California, 274 U.S. 357 (1927)	48
Williams v. United States, 405 F.2d 234 (5th Cir. 1968)	64

IV

UNITED STATES CONSTITUTION

First AmendmentCited throughout

UNITED STATES STATUTES

15 U.S.C. Section 1051 <i>et seq.</i>	47
15 U.S.C. Section 1052(a)	49
15 U.S.C. Section 1091	49

FEDERAL RULES OF CIVIL PROCEDURE

Rule 15(b)	62
Rule 16	63
Rule 52(a)	8
Rule 54(c)	62, 63

TEXAS STATUTES

Tex. Bus. & Comm. Code, Art. 17.41 <i>et seq.</i>	26
Texas Optometry Act of Article 4552, R.C.S.:	
Section 1.02(1)	24
Section 2.02	4
Section 3.02(a)-(b)	25
Section 3.05	25
Section 4.01B	25
Section 4.04(a)	5
Section 4.04(a)(2)	32
Section 4.04(a)(11)	25
Section 5.01	25
Section 5.04(5)	26
Section 5.05	24
Section 5.06	26
Section 5.07	26
Section 5.11	35
Section 5.12	38
Section 5.12(c)	27
Section 5.13(b)	26
Section 5.13(c)	28, 32
Section 5.13(d)	Cited throughout
Section 5.13(e)-(i)	26
Section 5.13(j)	5
Section 5.14	26
Section 5.15(d)	29

TEXTS

1 J. McCarthy, Trademarks and Unfair Competition, Section 9:1 (1973)	47
--	----

IN THE Supreme Court of the United States OCTOBER TERM, 1977

NOS. 77-1164 & 77-1186

DR. E. RICHARD FRIEDMAN, O. D., DR. JOHN B. BOWEN,
O. D., DR. HUGH A. STICKSEL, JR., O. D., DR. JOHN W.
DAVIS, O. D., DR. SAL MORA, O. D., Individually and in their
official capacity as members of THE TEXAS OPTOMETRY BOARD;
and THE TEXAS OPTOMETRIC ASSOCIATION, INC.,
Appellants

v.

DR. N. JAY ROGERS, O. D. and W. J. DICKINSON, Individually
and as President of the TEXAS SENIOR CITIZENS ASSOCIATION,
PORT ARTHUR, TEXAS CHAPTER,
Appellees

On Appeal from the United States District Court for the Eastern District of Texas (Three-Judge)

MOTION TO AFFIRM

By unanimous Final Judgment and Memorandum Opinion a properly-convened Three-Judge United States District Court for the Eastern District of Texas declared unconstitutional and enjoined the enforcement of provisions of the Texas Optometry Act¹ that broadly forbid Texas optometrists to practice their profession under, or use in connection with their practices, any trade name, corporate name, assumed name or any other name except the name under which the individual optometrist holds

1. Revised Civil Statutes of Texas, Article 4552 *et seq.*

his or her license. On the basis of a massive evidentiary record and careful attention to legal authorities, the District Court grounded its decision on the First Amendment of the United States Constitution. The District Court's findings are overwhelmingly, if not conclusively, supported by the competent, credible evidence of record. The District Court's legal determinations follow naturally, firmly and directly from controlling decisions of this Court. Therefore, the District Court's holding is a sound and correct one.

The defendants below² (hereinafter referred to collectively as "Appellants") have filed Jurisdictional Statements in this Court complaining on direct appeal of the District Court's rulings with respect to the issues of trade name communication in the profession of optometry. The District Court correctly adjudicated these issues in paragraph 2 of its Final Judgment, which is now in contention, in the following manner:

Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas, is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name

2. There were two groups of defendants in the District Court. The first group consists of the current members of the Texas Optometry Board with the exception of Plaintiff-Appellee Dr. N. J. Rogers. This group has been represented throughout by the Attorney General of Texas.

The second group of defendants consists of a private trade association, the Texas Optometric Association, Inc., which is represented by private counsel. The Texas Optometric Association, Inc. (TOA) supports the position of the Attorney General of Texas herein.

other than the name under which he is licensed to practice optometry in Texas." Members of the Texas Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.³

The plaintiffs below⁴ (referred to herein collectively as "Appellees") respectfully submit that it is manifest that the complaints now sought to be advanced by Appellants are so meritless and unsubstantial as to warrant no further argument. Accordingly, pursuant to Section 1(c), Rule 16, of the Revised Rules of this Court, Appellees respectfully move for summary affirmance of the portion of the District Court's Judgment complained of by Appellants.⁵ In the alternative, Appellees urge the Court to take no action herein without first setting this cause for plenary consideration, at which time the Appellants should be required to show cause—if any there be—for any disturbance of the Judgment of the District Court as it pertains to the indisputably valuable commercial information publicized by a trade name.⁶

3. Final Judgment signed on October 27, 1977.

4. The Plaintiffs-Appellees are Dr. N. Jay Rogers, himself a member of the Texas Optometry Board for over twenty years, and Mr. W. J. Dickinson, individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter. All Appellees are represented by the same team of counsel.

5. Not to be confused with the portion of the District Court's Judgment now in contention is the separate portion, found at paragraph 4 of the Final Judgment, which upheld Section 2.02 of the Texas Optometry Act against the Plaintiffs' equal protection, due process and First Amendment challenges. That portion is the subject of a separate direct appeal brought before this Court by the same parties who are the Appellees herein.

6. In the event the Court determines the appeal relating to trade,

OPINION BELOW

The Memorandum Opinion of the Three-Judge District Court is reported under the style *Rogers v. Friedman* at 438 F. Supp. 428 (Sept. 12, 1977). The Judgment below is unreported. Both the opinion and Judgment are reproduced as appendices to the Jurisdictional Statement filed herein by the Attorney General of Texas on behalf of Appellants Friedman, et al.

JURISDICTION

Appellees are satisfied with the correctness of the statement as to this Court's jurisdiction found at pages 2-3 of the Jurisdictional Statement of Appellants Friedman, et al.

STATUTES INVOLVED

The portion of Section 5.13(d) of the Texas Optometry Act that the District Court held unconstitutional reads as follows:

No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas;

* * *

Other sections of the Texas Optometry Act of which this Court should be aware include the following, in pertinent part:

corporate and assumed names to be appropriate for full briefing and argument, Appellees further urge the Court to consolidate therewith the appeal described in note 5, *supra*, concerning Section 2.02 of the Texas Optometry Act.

Section 5.13(j)

The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license.

* * *

Section 4.04(a)

The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

* * *

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

* * *

In addition to the foregoing statutes, other provisions of the Act that properly affect the disposition of this cause are reproduced for the Court's convenience at Appendix A hereto.

QUESTIONS PRESENTED

In the interest of this Court's time and convenience, Appellees will address the issues in essentially the same terms and in the same order as they are proposed at pages 3-4 of the Jurisdictional Statement of Appellants Friedman, et al. Appellees do not agree, however, that the questions submitted by Appellants accurately or ade-

quately portray the posture of this case, and, accordingly, relevant subquestions omitted by Appellants, will be noted as they arise in the argument under each broad question.

STATEMENT OF THE CASE

Appellees are unsatisfied with the completeness of the statement found at pages 4-5 of the Jurisdictional Statement filed by Appellants Friedman, et al.,⁷ and, with a proper regard for the evidence of record, the District Court's findings therefrom and the applicable constitutional law, submit the following Statement in opposition thereto.

This suit was originally filed in August 1975. The parties and other interested persons were then allowed more than a year to obtain and present evidence, to set hearings, to intervene, to file motions and to present legal arguments. Prior to the closing of the record, the Appellants were afforded unlimited opportunity to submit every conceivable justification within their vast resources for the Texas statutory prohibition against the use of trade names in connection with the practice of optometry. Yet, instead of adducing relevant, contemporary evidence on the subject, the Appellants elected largely, if not entirely, to rely on presently-unsubstantiated, time-worn hyperbole from the majority opinion of the Texas Supreme Court in *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (1967), a case which was litigated some ten years previously and in which no First Amendment issues were decided, raised or even intimated.

7. Which Statement is concurred in by Appellant TOA at pages 3-4 of TOA's Jurisdictional Statement.

Following the closing of the evidentiary record in September 1976, the Three-Judge District Court below gave careful consideration to all aspects of this case for over a year. Eventually, the District Court concluded that the portion of Section 5.13(d) of the Texas Optometry Act which effects a sweeping, blanket prohibition against the optometrist's use of any trade, corporate or assumed name in connection with his or her optometry practice violates the optometrist's First Amendment right to disseminate and the consuming public's First Amendment right to receive several types of meaningful, identifiable, valuable commercial information that inheres in a trade symbol in our free enterprise society—a society in which innumerable private economic decisions play a vital role.

Before this Court the Appellants continue to press the same tired theories, lifted from the *Carp* decision, that the District Court found lacking in evidentiary support and legal merit on the present record, under present-day constitutional law. Likewise, the Appellants continue to ignore the compelling showing made by the evidence with respect to the very real communicative values of trade symbolism—in particular the Texas State Optical (TSO) trade name which Appellee Dr. Rogers and other optometrists have used with dignity for over thirty-five years throughout Texas.

Of utmost significance to this Court is the reality that Appellants have utterly failed to mount a proper challenge to the fundamental basis of the District Court's ruling. The District Court plainly stated: "*Based on the evidence and the briefs before this Court, the Court finds defendants' contentions unpersuasive.*" 438 F. Supp. at 430 (emphasis added). This Court will especially observe

that *nowhere* have Appellants attacked the District Court's factual determinations as "Clearly erroneous" within the meaning of Rule 52(a), Federal Rules of Civil Procedure.⁸ Appellants, then, must necessarily fail in their belated efforts—thinly disguised as objections to the trial court's legal analysis—to reargue and relitigate the controlling *facts* of this case in this Court. See, particularly, Jurisdictional Statement of Appellants Friedman, et al. at pages 12-14; Jurisdictional Statement of Appellant TOA at 10-11, 13-17.

The facts of this dispute, which are incontestably established by the probative evidence and, in any event, are not now in issue for want of a proper challenge, are actually quite straightforward and, indeed, rather predictable, considering the subject matter. The District Court found that the communicative value of a trade name grows by its continued use. "[P]eople identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product." 438 F. Supp. at 431. The District Court found that a trade name is an integral component of *advertising*. It also found that a particular trade name, TSO, has come to communicate to the public a composite

8. Rule 52(a) provides, of course, that if a memorandum opinion is filed it will be considered sufficient if the district court's findings of fact and conclusions of law appear therein. That the District Court in this case clearly intended its Memorandum Opinion as a statement of both its findings of fact and conclusions of law is demonstrated by its statement: "Any finding of fact heretofore made which constitutes a conclusion of law is hereby adopted as a conclusion of law and any conclusion of law which is a finding of fact is hereby adopted as a finding of fact." 438 F. Supp. at 434. The District Court's Memorandum Opinion is sufficient unto itself, and it was not necessary for the trial court to make subsidiary findings on every evidentiary issue. *Elam v. United States*, 250 F.2d 852 (6th Cir. 1958); *Stone v. Farnell*, 239 F.2d 750 (9th Cir. 1957).

of *valuable consumer information* about the sponsor's prices, the quality of its services and materials and the manner in which particular routine visual goods and services are available. *Id.* Of equal significance, the District Court, on the basis of the evidence before it, explicitly rejected Appellants' contentions "that the TSO name misleads the public as to who is the responsible optometrist." *Id.* at n. 3.

In the light of these thoroughly valid and binding factual determinations the District Court's invocation of the "rationale of the advertising cases"⁹ met every principled test of logic, precedent and constitutional adjudication—including the doctrine that federal courts must show proper regard for legitimate state functions. Contrary to Appellants' suggested parade of horrible consequences for the public health and welfare, the District Court announced no novel or bizarre First Amendment result by its narrow holding that the State of Texas may not, through the *blanket suppression* of the use of a trade name in connection with the practice of optometry, effectively deny the consuming public all or most of the valuable commercial information so readily and efficiently conveyed by a trade name—a medium that virtually every man, woman and child in this country relies upon daily and, indeed, takes for granted.¹⁰

9. 438 F. Supp. at 431. The "advertising cases" are, of course, *Bates v. State Bar of Arizona*, ____ U.S. ____, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976).

10. Appellees do not pretend to be sufficiently sage as to represent to this Honorable Court that this particular case bears either national significance, as argued in the Jurisdictional Statement of Appellant TOA at 4, or significance to twenty states, as suggested

This lawsuit involved two basic aspects of the Texas Optometry Act:

- (1) The 4-2 makeup of the Optometry Board¹¹
- (2) The tradename practice of optometry.

by Appellants Friedman, et al., in their Jurisdictional Statement at 14, n. 1 (which, if true, would indicate *insignificance* to thirty states), significance within the State of Texas only, or, as a practical matter, significance only as between the actual parties. Nonetheless, Appellees would emphasize that, in their view, the holding of the District Court is a narrow one with important practical limitations.

Specifically, it is fundamental that a party must suffer some injury to a legally-protected interest in order to have standing to challenge the constitutionality of a statute. In this particular case the Appellees' standing to challenge Section 5.13(d) of the Texas Optometry Act is established by the overwhelming evidence that the TSO trade name, as a source symbol, actually does convey valuable commercial information, the suppression of which injures Dr. Rogers economically and denies the consumer information about the quality, prices and availability of the sponsor's goods and services. In a different case involving a different source symbol, however, the complainant may be unable to make an adequate evidentiary showing that the trade symbol at issue actually possesses significant informative value. If that is the case, then the prohibition of the symbol itself has no real effect on the complainant's interests, and the complainant will lack the requisite standing to pursue a genuinely adverse challenge to the prohibition. So viewed, it may very well be that this case bears no major significance beyond the immediate parties. Such diminished significance, Appellees submit, presents additional, weighty justification for a summary affirmance of the District Court.

A closely-related and supportive analysis is contained in *Bates v. State Bar of Arizona*, *supra*, ____ U.S. at ____, 97 S.Ct. at 2707-2708, 53 L.Ed.2d at 834, wherein this court emphasized that, in the professional commercial speech context, the overbreadth doctrine will not be recognized, but instead the complainant must demonstrate that the challenged restraint is unconstitutional as applied to him. Accord, *Bigelow v. Virginia*, 421 U.S. 809, 817-818, 95 S.Ct. 2222, 2230, 44 L.Ed.2d 600 (1975).

11. The decision below is the basis of appeal in No. 77-1164, N. Jay Rogers, et al v. E. Richard Friedman, et al, October Term, Supreme Court of the United States.

Appellants complain of the scope and breadth of the injunction and pendente lite orders enjoining enforcement not only of Section 5.13(d) of the Texas Optometry Act but "*any other provision of the Act which prohibits in any way the practice of optometry under a tradename.*" The injunction upon which the appeal is based was entered October 27, 1977, after the filing of briefs and chambers conferences involving all parties (Appellants' Jurisdictional Statement, page 20)

On February 16, 1976 the Appellants, through the Attorney General, specifically agreed in "form and substance" to the entry of an order pendente lite exempting one of Appellee's offices "from the prohibitions of Section 5.13(d) and like 'tradename' prohibitions of the Texas Optometry Act."¹²

The mass of evidence adduced in this case¹³ and the briefs of all parties in the Court below and in the Supreme Court have addressed the basic issue in dispute, that is the tradename practice of optometry and its First Amendment consequences.

The memorandum opinion of the Court below dealt very plainly with "the inclusion of *tradenames* within the protected First Amendment right of commercial free speech," of the tradename's being "within the protective fold of advertising" and as "part of the consuming public's right to valuable information". The three-judge court concluded that "blanket suppression of the use of tradename

12. See Appendix B.

13. Particularly the testimony of Dr. N. Jay Rogers, Dr. Richard Friedman, Dr. Nelson Waldman, Dr. Robert Shannon and Mr. Stanley Boysen, together with the extended direct and cross-interrogatories of Dr. Lee Benham, by Appellants, Appellee and Intervenor.

results in unwarranted restriction of the free flow of commercial information". 438 F. Supp. at 431.

Since Appellants agreed to an order pendente lite relating to Section 5.13(d) and like "tradename prohibitions" in the Texas Optometry Act pending final judgment of the Court, it ill-behooves them now to complain of an identical order pendente lite or the final judgment couched in virtually the identical language of the identical import.

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE FIRST AMENDMENT IS VIOLATED BY A STATUTE PROHIBITING LICENSED TEXAS OPTOMETRISTS FROM PRACTICING UNDER, OR USING IN CONNECTION WITH THEIR PRACTICES, ANY TRADE NAME, CORPORATE NAME OR ASSUMED NAME.

A. GENERALLY.

1. The Statute and its History.

Appellants note that the trade name prohibition now contained in Section 5.13(d) of the Texas Optometry Act (enacted in 1969) was originally adopted in 1959 as part of a rule by the former Texas State Board of Examiners in Optometry prior to the Texas Legislature's withdrawal of the Board's rulemaking authority. Appellants also make much over the fact that Appellee Dr. Rogers participated in the work of a committee of legislators and optometrists which led to the enacted optometry regulatory bill in 1969. Appellants further ob-

serve that Dr. Rogers was a complaining party in the *Carp* case before the Texas courts, as he had every right to be.

Appellants, however, have scrupulously omitted to mention several significant items of which this Court should be aware. In the first place, the so-called "Professional Responsibility Rule" was repealed by the Texas State Board of Examiners in Optometry prior to the 1969 Texas legislative session.¹⁴ This repeal occurred by mail ballot the efficacy of which was disputed by members of Appellant TOA but never legally resolved. The mail ballot became necessary because, for a period of two years between 1967 and 1969, the *three TOA members* of the then-five member Board of Examiners in Optometry *refused* to meet with the two non-TOA members, thus precluding a quorum.¹⁵ During that interregnum the

14. Deposition of Dr. N. Jay Rogers taken January 13-14, 1976, at pages 75-79 (hereinafter called "Rogers depo. I"). Appellants assert that the adoption of the "Professional Responsibility Rule" followed the "overwhelming vote of optometrists licensed in Texas". Jurisdictional statement of Appellants Friedman, et al, at 4. Ironically, the "For Sale" sign ban struck down on First Amendment grounds by this Court in *Linmark Associates, Inc. v. Township of Willingboro*, ___ U.S. ___, 97 S.Ct. 1614, 52 L.Ed.2d at 159 (1977) had received the "overwhelming support" of residents and leaders in the community.

15. *Id.* at 79-80.

This brings forward the question: Why have the members of TOA endeavored so persistently over the years to repress the mercantile features of "commercial" optometry? The credible evidence in the record overwhelmingly establishes that TOA's true reasons have arisen largely, if not wholly, from economic self-interest. As explained by the testimony of Plaintiff:

Q. Have these disputes [between the "commercial" and "professional" modes of practice] been represented again by the factionalism that you have discussed?

A. Yes.

Q. Does that factionalism sooner or later become an economic issue?

Board failed to examine prospective licensees or otherwise function as a governmental body.

A. Yes.

Q. How and in what way does it become related to economics?

A. Well, because the big dispute between the two factions, which is strictly the question of mode of practice, has to do with competition in the market, *competition in the field of opticianry and optometry and the efforts over the years by the TOA, the efforts have been to prohibit certain practices in the practice of optometry for the purpose of either eliminating or reducing the competition for the patients. So it ultimately boils down to one of economics between the two groups, one group trying to stifle the operations or limit the operations—that is, the TOA group trying to limit the operations of the non-TOA or the corporation [sic, commercial] group.*

* * * *

[T]he net effect primarily is increased costs to the public. That's the primary effect.

* * * *

Q. How does it inure to the benefit of the TOA members?

A. Well, as the competition is lessened or reduced, and as a result of that, lesser numbers will seek the services of the commercial optometrists, the result of that is *some of those members of the public who might normally or would normally seek the services of the commercial optometrists and who do not as a result of the restrictions placed upon the commercial optometrists both in the form of their inability to obtain information as a result of restricted practices in advertising as well as increased costs that the commercial optometrists are faced with and have to pass on to the public. Some of the public will then be seeking the services of the non-commercial or the so-called professional optometrists, and it is a means of driving more and more people away from the commercial practitioner to the non-commercial practitioner.*

* * * *

(Rogers depo. II, at 127-129) (emphasis added).

Dr. Rogers testified that "the net effect primarily is increased costs to the public." The entire record demonstrates that he was clearly correct, and also demonstrates that increased costs to the public are **the hallmark and staple** of so-called "professional" optometry. Dr. Rogers, himself a highly successful and respected Texas optometrist for some thirty-seven years, elaborated upon the synonymy of TOA "professional" optometry and high fees, as opposed to the lower fees charged for identical services by "commercial" optometrists:

Then, with the arrival of the 1969 Texas legislative session, representatives of the TOA and non-TOA op-

Q. In your experience in having dealt with this matter over the last forty years, what in your experience does TOA stand for?

A. Well, it stands for a certain type of outward appearance in the practice of optometry, and that is, they wish to appear on a more so-called professional appearance similar to the dentists, the lawyers, the medical doctors, and they simply want to hold themselves out in what would appear to be a more professional type, less commercial type of practice by the general physical appearance of their offices.

Q. Does this appearance, professionalism, result in any different quality of service to the consuming public?

A. No.

Q. Does it result in any—that is the appearance of professionalism, does it result in any fee structure?

A. Yes.

Q. To the public?

A. Yes.

Q. What is the difference in the fee structure between the commercial and the so-called professional or TOA associated optometrists?

A. The basic difference is that the so-called professional optometrists, the members of the TOA, have a fee system or fee structure where *they break down their services and their service fees such as examination fees, technical fees, re-evaluation fees, and there are several others to where the fee to the patient, to the public for the examination and the allied services that are part of the prices of optometry are much higher than the fees for that same service that the commercial optometrists charge.* For example, the examination fee of the professional optometrist ranges anywhere from fifteen or eighteen dollars even up to as high as thirty-five or more for the examination aspect of it. *So the professional optometrists derive a great portion of their net profit or their profit from the patient in the form or guides [sic, guise] of professional fees.*

* * * *

It's much higher than the average commercial optometrist.

Id. at 120 et seq.

The consequences of enacting laws to suppress commercial information, such as that communicated by a trade name, follow a basic economic sequence. Consumers in the restricted market will lack the unimpeded opportunity to select that mix of price, quality, service, convenience.

tometric factions conferred with various state legislators with a view toward reaching a compromise on a new optometry law. The "compromise" was ultimately imposed by an arbitrator, whose decision the opposing factions agreed in advance to accept, at least in principle.¹⁶

At that time, however, certainly no one, including Dr. Rogers, could have reasonably anticipated the First Amendment problems that would eventually arise in connection with Section 5.13(d) of the new Act. Perhaps it was for that reason that the District Court in this case refused to sustain the defendants' arguments that Dr. Rogers had somehow "waived," or had become "estopped" to assert, the First Amendment defects in Section 5.13(d). Appellants wisely have not brought forward their "waiver" and "estoppel" theories to this Court. See *Elrod v. Burns*, 429 U.S. 347, 359 at n. 13, (1976).

That the First Amendment issues surrounding Section 5.13(d) were not reasonably foreseeable in 1969 is further indicated in that the *Carp* case, upon which Appellants now rely so heavily, did not involve the First Amendment topside or bottom. As the court below correctly explained:

[T]his Court notes (1) the question before the Texas Court in *Carp* was not constitutional but whether the Texas board had exceeded its delegated

and ambience which best meets their individual need. If consumers cannot freely select among the variety of available product and service packages, then many will be charged high prices for services and products they do not need or for more expensive items than they would have purchased had adequate information existed.

16. Proceedings Before the Texas Senate Public Health Committee, May 9, 1969, on file in the record under official certificate of Charles Schnabel, then-Secretary of the Texas Senate.

power from the legislature, (2) the names whose use were in question were those of licensed optometrists who sold *Carp* their locations, and (3) the *Carp* decision was rendered well before the recent Supreme Court pronouncements in *Va. Pharmacy Bd. v. Va. Consumer Council*, *supra*, and *Bates v. State Bar of Arizona*, *supra*.¹⁷

Under these circumstances the Texas Supreme Court's majority opinion in *Carp* is even less authoritative to the issues *sub judice* than was *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969) to the issue of price advertising of prescription drugs considered in this Court's *Virginia Pharmacy* decision. See 425 U.S. at 753. As this Court observed, the First Amendment was at least invoked in the *Patterson Drug* case.

2. The Approach of the Court Below.

As matters of *fact* the District Court, after carefully considering all the evidence, found:

"that a trade name is encompassed within the meaning of advertising . . ."¹⁸

and

"that the Texas State Optical name [TSO] has come to communicate to the consuming public information as to certain standards of price and quality, and availability of particular routine services."¹⁹

In adding its explicit rejection of the defendants' arguments that the TSO name misleads the public as to

17. 438 F. Supp. at 430.

18. *Id.*

19. *Id.* at 431.

the responsible optometrist's identity, the District Court nonetheless properly observed that its decision has no effect on regulations requiring the posting of the attending optometrist's name or the requirement that optometrists whose names are posted work a minimum number of hours per week.²⁰ It is obvious from its Memorandum Opinion that the District Court has left the state ample leeway to devise and enforce any additional regulations deemed necessary or appropriate to enhance the qualifications of optometric licensees and to act as it sees fit in order to curtail specific abuses, whether in the form of deception, incompetence, immorality or otherwise. Indeed, a multiplicity of such regulations presently exist in Texas, totally undisturbed by the result below.

It bears repeating that nowhere have Appellants attached the trial court's factual findings as "clearly erroneous." Nor could Appellants seriously do so. For example, it is indisputably true that people do identify a trade name (or other source symbol) with a "certain quality of service and goods, the end result being that eventually the name itself calls public attention"²¹ to the product or service sponsored thereunder.²² That being the case, it was entirely correct for the District Court to follow the First Amendment analysis—whether terms a "balancing test" or otherwise—called for by this Court

20. *Id.*, n. 3.

21. *Id.* at 431.

22. The point was recently well put in *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499, 512 (1st Cir. 1975):

From a policy point of view, the functions served by a trademark (or service mark)—an indication of origin, a guarantee of quality, and a medium of advertisement, 3 Callman, § 66.3, p. 36—suggest association with enterprises selling their goods or services.

in such controlling decisions as *Bates v. State Bar of Arizona*, *supra*; *Virginia Pharmacy*, *supra*; *Linmark Associates, Inc. v. Township of Willingboro*, ___U.S.____, 97 S. Ct. 1614, 1618-1619, 52 L.Ed.2d 155, 160-161 (1977); and *Carey v. Population Services International*, ___U.S.____, 97 S.Ct. 2010, 2024-2025, 52 L.Ed.2d 675, 694-695 (1977). See also *Bigelow v. Virginia*, *supra*.

B. THE COURT BELOW WAS CLEARLY CORRECT TO APPLY THE FIRST AMENDMENT "BALANCING TEST".

1. Commercial Content—Not "Conduct".

The District Court struck down the portion of Section 5.13(d) of the Texas Optometry Act that forbids the duly-qualified and licensed Texas optometrist to *practice under or use in connection with his practice* any trade name, corporate name, assumed name or any name other than the name under which he is licensed to practice optometry—meaning, with few exceptions, only his or her given name. It may be assumed for purposes of argument that Section 5.13(d) to some truistic degree regulates "conduct", as the Appellants contend. Yet, an adequate analysis cannot end there because it is also plain that Section 5.13(d) is aimed primarily at *communication* and, more precisely, at the *content* of the communication. The overwhelming purpose and effect of Section 5.13(d) is to suppress, restrain and fragment a cohesive package of valuable, intelligible commercial information, some typical discrete elements of which were articulated by the District Court, through prohibiting, suppressing and restraining the demonstrably efficient medium, the trade

name itself, by which the communication is circulated within the society, thereby drastically diminishing the availability and meaningfulness of the information to members of the society.

Just as the District Court labored under no obligation to credit the defendants' evidence on this issue merely because the State of Texas offered it, this Court is not obligated to accept the Appellants' simplistic "speech-conduct" dichotomy, as if a bright line separated the two, simply because the State of Texas has elected to apply those labels. Were that the penultimate analysis, then it could easily be argued that a number of this Court's decisions are incorrect. E.g., *Cohen v. California*, 403 U.S. 15 (1971) (exhibition of unpatriotic profanity in public building); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ku Klux Klan rally); *Thornhill v. Alabama*, 310 U.S. 88 (1940) (peaceful picketing); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (soliciting contributions); *Smith v. California*, 361 U.S. 147 (1959) (selling published matter for profit); *NAACP v. Button*, 371 U.S. 415 (1963) (solicitation of litigation); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (wearing armbands in school—"symbolic" speech).

2. Today's Constitutional Approach.

Instead, it is now abundantly clear that this Court has roundly rejected the superficial, label-predictive approach sought by Appellants. This Court has done so not necessarily in exactly the terms of "speech" and "conduct", for those verbalizations are largely inappropriate except in cases of incitement or breach of the peace, cf. *Carey v. Population Services International*,

supra, ____ U.S. at ____, 97 S.Ct. at 2025, 52 L.Ed. at 695, but rather in terms of "commercial" versus "non-commercial" speech. The point is best demonstrated by *Virginia Pharmacy, supra*, wherein this Court, in the course of discarding the "commercial speech" doctrine of *Valentine v. Chrestensen*²³ and *Breard v. Alexandria*,²⁴ stated:

Since the decision in *Breard*, however, the Court has never *denied* protection on the ground that the speech in issue was "commercial speech". That simplistic approach, which by then had come under criticism or was regarded as of doubtful validity by members of the Court, was avoided in *Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed.2d 669 (1973).²⁵

Just as in *Virginia Pharmacy, supra*; *Bates v. State Bar of Arizona, supra*; *Linmark Associates, supra*, and *Bigelow, supra*, the issue now before this Court is whether the state may validly erect a sweeping, blanket prohibition of useful, harmless, non-misleading information about an entirely lawful activity simply because the state fears that its recipients will utilize the information in making private economic decisions. As this Court emphasized

23. 316 U.S. 52 (1942).

24. 341 U.S. 622 (1951).

25. 425 U.S. at 759 (emphasis in original, footnote omitted). See also *Bigelow v. Virginia, supra*, 421 U.S. at 826:

"Regardless of the particular label asserted by the State—whether it calls speech 'commercial' or 'commercial advertising' or 'solicitation'—a court may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation".

in those cases,²⁶ the listener's interest is substantial—perhaps far keener than his desire for political dialogue; commercial speech performs an indispensable function in resource allocation by informing the public of the availability, nature, prices and, perhaps, quality of products and services; and advertising, however tasteless it may seem to some, nonetheless advances societal interests in assuring better-informed decisions. Given these considerations in light of the District Court's findings with respect to the communicative value of a trade name, it becomes manifest that Section 5.13(d) of the Texas Optometry Act must be adjudged from the same perspective as the sweeping restrictions on “commercial speech” which this Court struck down in those cases. Specifically, “[i]f there is a kind of commercial speech that lacks *all* First Amendment protection . . . it must be distinguished by its *content*”. *Virginia Pharmacy, supra*, 425 U.S. at 761; *Bates v. State Bar of Arizona, supra*, ____ U.S. at ____, 97 S.Ct. at 2699, 53 L.Ed.2d at 824 (emphasis added).

3. The “Balancing Test” Fits.

Accordingly, the so-called “balancing test” employed by the court below constituted a proper and correct First Amendment analysis in this case. The District Court examined the defendants’ several proffered justifications for the trade name ban and weighed them against the consequent deprivation of informational interests. See 438 F. Supp. at 430. That Section 5.13(d) might have passed muster under a due process or equal protection

26. See particularly this Court’s summary of *Virginia Pharmacy* in *Bates, supra*, ____ U.S. at ____, 97 S.Ct. at 2699, 53 L.Ed.2d 823, 824.

attach was properly deemed of limited relevance to the First Amendment question, *id.* at 430, n. 1,²⁷ even though Appellants apparently continue to think otherwise.²⁸ It is simply no answer to the constitutional issue to proclaim arbitrarily, as do Appellants, that the impact of Section 5.13(d) upon the optometrist and the consuming public is “incidental” or “indirect” when in fact the economic message itself is irreparably stifled, atomized and subdued by suppression of a traditional, widely understood, highly effective medium. *Linmark Associates v. Township of Willingboro, supra*, ____ U.S. at ____, 97 S.Ct. at 1618, 52 L.Ed.2d at 162. Inevitably the public is deprived of valuable commercial information by virtue of a protection based in large part on public ignorance, and the “rationale of the advertising cases” thereby comes into play.²⁹

C. THE COURT BELOW STRUCK THE CORRECT “BALANCE”.

1. What Is and Is Not at Issue Herein?

In their Jurisdictional Statements the Appellants confuse and obfuscate the narrow issues before this Court with a variety of meritless contentions. Those contentions were also presented to, and necessarily rejected by, the

27. See also *Virginia Pharmacy, supra*, 425 U.S. at 769.

28. See Jurisdictional Statement of Appellants Friedman, et al. at 6, 9.

29. Appellees desire to comment on certain statements found at page 8 of the Jurisdictional Statement of Appellants Friedman, et al., only to point out that the Assistant Attorney General’s references to other alleged lawsuits, and the problems she has encountered in defending them, are *dehors* the record of this cause and, Appellees submit, entirely irrelevant to the issues at hand.

District Court, even though the court below justifiably saw no occasion to write separately in respect of each one. In addressing Appellants' arguments, Appellees respectfully submit that none should give this Court the slightest pause.

(a) *Legality of the Regulated Activity*—Texas law defines the "practice of optometry" in the following basic terms:

[T]he employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state.³⁰

Hence, under Texas law optometrists may examine the eyes, measure the power of vision, fit, prescribe and, as they do frequently, dispense corrective lenses. But clearly the optometrist is not lawfully a *healer*. An optometrist who purports to act as a healer by treating or prescribing for any diseased condition is deemed guilty of practicing medicine without a license.³¹ An optometrist who willfully or repeatedly represents to the public that he is competent to treat or heal any disease of the eyes is

30. Section 1.02(1), Texas Optometry Act (reproduced at Appendix A).

31. Section 5.05, Texas Optometry Act (reproduced at Appendix A).

subject to having his optometry license cancelled, suspended or revoked.³²

Every optometrist who practices optometry in Texas must become licensed by the Texas Optometry Board. In order to obtain the optometry license, the applicant must have completed successfully at least forty-eight months of education, approved by the Texas Optometry Board, at a reputable university or college of optometry³³; the applicant must be of "good moral character";³⁴ and the applicant must pass a comprehensive scholarly and practical examination "in theoretical and practical optometry, in the anatomy, physiology and pathology of the eye as applied to optometry. . . ."³⁵ Once licensed, the optometrist must satisfy continuing education requirements as a condition of license renewal.³⁶

Equally extensive regulations exist to protect the public against numerous varieties of fraud, deceit, incompetence and unfitness of optometrists in the course of their licensed practices. Every optometrist must conspicuously display his license in the office.³⁷ No optometrist may

32. Section 4.04(a)(11), Texas Optometry Act (reproduced at Appendix A).

33. Section 3.02(a)-(b), Texas Optometry Act (reproduced at Appendix A).

34. *Id.*

35. Section 3.05, Texas Optometry Act (reproduced at Appendix A).

36. Section 4.01B, Texas Optometry Act (reproduced at Appendix A).

37. Section 5.01, Texas Optometry Act (reproduced at Appendix A).

practice optometry from house-to-house or on the streets.³⁸ The optometrist is forbidden to prescribe corrective lenses without having first made a personal examination of the prescriber's eyes.³⁹ The optometrist may not give any spectacles or eyeglasses as a premium or inducement to the purchase of any other article.⁴⁰ Fee-splitting with unlicensed persons is prohibited,⁴¹ as is affiliation with any "mercantile establishment",⁴² as is the use of a licensed optometrist's name on or about any premises at which the named optometrist is not "actually present and practicing optometry".⁴³ Furthermore, the optometrist's license is subject to cancellation, suspension or revocation by the Texas Optometry Board for any gross immorality; dishonesty or misrepresentation; incompetence due to negligence; conviction of crime; habitual drunkenness or drug addiction; aiding unauthorized practice; employment of solicitors; or any willful or repeated violation of the Texas Optometry Act.⁴⁴

38. Section 5.04(5), Texas Optometry Act (reproduced at Appendix A).

39. Section 5.07, Texas Optometry Act (reproduced at Appendix A).

40. Section 5.06, Texas Optometry Act (reproduced at Appendix A).

41. Section 5.13(b), Texas Optometry Act (reproduced at Appendix A).

42. Section 5.14, Texas Optometry Act (reproduced at Appendix A).

43. Section 5.13(e)-(i), Texas Optometry Act (reproduced at Appendix A).

44. Section 4.04(a), Texas Optometry Act (reproduced at Appendix A). Furthermore, the Texas legislature has adopted very strong preventive and punitive legislation against deceptive advertising. Art. 17.41 et seq. Tex. Bus. & Comm. Code, Deceptive Trade Practices-Consumer Protection Act.

In short, the practice of optometry in Texas is "subject to extensive regulation aimed at preserving high professional standards". Cf. *Virginia Pharmacy*, *supra*, 425 U.S. at 768. Indeed, in contrast to the *Virginia Pharmacy* and *Bates* cases, there is considerably *more* regulation of optometrists in Texas than of pharmacists in Virginia or lawyers in Arizona. Specifically, in the field of optometry the Texas legislature has addressed the optometric examination itself and has mandated by statute the steps deemed appropriate by the state "to insure an adequate examination of a patient".⁴⁵ An optometrist's willful or repeated failure to perform any of the steps of this basic competence" examination constitutes *prima facie* evidence of negligence for which the optometrist's license may be cancelled, revoked or suspended, and the optometrist bears the burden of proof that the omission did not result in an inadequate examination.⁴⁶

A review of the statutes described above, *none* of which is in issue in this case, concretely demonstrates that optometry, when practiced within the confines of the optometric license, is a *perfectly legal* activity in the State of Texas. The legality of optometry contrasts sharply with the *illegality* of employment discrimination, a prohibition against the advertising of which was upheld by this Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁴⁷ a case incorrectly relied on by Appellants herein.

In point of fact, Appellants seemingly would mislead this Court by suggesting that the District Court applied

45. Section 5.12, Texas Optometry Act (reproduced at Appendix A).

46. Section 5.12(c), *id.*

47. 413 U.S. 376 (1973).

the "rationale of the advertising cases" so as to legalize an "illegal activity" in order that it may be advertised.⁴⁸ This specious assertion is easily refuted. Appellants appear to be concerned that various licensed Texas optometrists employed by or affiliated with Dr. Rogers will use the TSO trade name in connection with the optometry offices where they practice and thereby *disclose* to the public their affiliation, which, as the District Court so rightly found, the public has come to recognize as a meaningful, valuable symbol of price, quality and availability of goods and services.⁴⁹

If such occurred would the result of more information instead of less embrace an "illegal activity"? Absolutely not. The law of Texas is clear on the pivotal point, which Appellants seek so cleverly to disguise:

This Act does not prohibit an optometrist from *being employed* on a salary, with or without bonus arrangements, *by a licensed optometrist* or physician, *regardless of the amount of supervision* exerted by the employing optometrist or physician *over the office in which the employed optometrist works*, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.⁵⁰

and

48. See, particularly, Jurisdictional Statement of Appellants Friedman, et al. at 8; Jurisdictional Statement of Appellant TOA at 4.

49. For a complete understanding of the long-time economic battle between the TOA-Appellants and Appellees see pages 3-6 of the Jurisdictional Statement of Appellant in the Companion case before this court in *Rogers, et al v. Friedman, et al.* 77-1164, October Term, 1977.

50. Section 5.13(c), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

No person . . . engaged in the business of a dispensing optician, *other than a licensed optometrist* . . . shall have, own, or acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry . . .⁵¹

and

Optometrists who are *employed by other optometrists* shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed.⁵²

In other words, under present Texas law it is perfectly legal for Dr. Rogers, himself a licensed optometrist, to employ other optometrists at varying locations. Furthermore, as a licensed optometrist Dr. Rogers is entitled under Texas law to own the offices at which the optometrists employed by him conduct their practices. Moreover—and of great significance—nowhere do the laws of Texas limit in any way the *number* of optometrists Dr. Rogers may employ or the *number* of offices he may own.

Actually, the *only* pertinent limitation imposed by Texas law, apart from the trade name ban, simply requires the employed optometrist to practice at his office using his own name without posting the names of other optometrists who do not regularly practice there. Plainly this limitation is not inconsistent with the use by the employed optometrist of a trade, corporate or assumed name sponsored by the employing optometrist *in addition* to the employed optometrist's given name, which will be

51. Section 5.15(d), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

52. Section 5.13(d), Texas Optometry Act (reproduced at Appendix A) (emphasis added).

posted outside the office door and disclosed on the face of the license mounted on the optometrist's office wall, and perhaps elsewhere if he or she so chooses.

In conclusion, licensed optometry practiced in the manner to which Appellants object represents in no respect an "illegal activity". That being so, the use of a trade symbol in connection therewith will not convert an otherwise lawful activity into an illegal one, nor will the trade symbol propose an illegal transaction. Appellants' real objections appear to go to the *legality* under Texas law of the ownership of licensed optometrists of multiple optometry offices. Appellants, however, may not seek remedy for that grievance in this Court. Their proper forum is the Texas legislature.

(b) *The District Court's Decision Does Not Allow the Optometrist to "Hide Behind" a Trade Name.*—The precise holding of the court below is quite narrowly framed:

[T]his Court . . . holds that *blanket suppression* of the use of trade names results in unwarranted restriction of the free flow of commercial information and therefore represents an unconstitutional violation of the first amendment.⁵³

In recognition of the limits of its holding, the District Court immediately added:

The Court would point out . . . the fact that blanket suppression of a trade name is unconstitutional *does not* prohibit or invalidate regulations having to do with the posting of the optometrists' names present, or the requirement that those optometrists whose

53. 438 F. Supp. at 431 (emphasis added, footnote omitted).

names are posted work so many hours per week at their place of business.⁵⁴

Of course, neither did the District Court anywhere suggest that the state may not adopt and enforce any number of other reasonable statutes or regulations for the protection of the public. Such regulations could easily include prohibitions of trade symbols that amounted to gimmickery or bait-and-switch advertising or misleading sloganism.⁵⁵ Certainly the state might also legitimately control the number of different trade names used by a single sponsor. In order to prevent deception, confusion or "passing off" the state could validly control the similarity of trade names employed by different sponsors. Or the state might require each trade name sponsor to impose specific quality control standards for services and materials sold at each location using the sponsor's trade name. The trial court *did* specifically find, however, that the TSO name is *not* misleading to the public in terms of fixing the individual optometrist's professional responsibility to his or her patients.⁵⁶

Appellants now argue repeatedly, as they argued to no avail in the trial court, that an optometrist's use of a trade name in connection with his practice results in the optometrist concealing his true identity from his patients and "hiding behind" the trade name.⁵⁷ Appellants rely on conclusory *non-sequiturs* lifted from the Texas court's majority opinion in *Carp*, *supra* none of which

54. *Id.*, n. 3 (emphasis added).

55. See footnote number 41.

56. 438 F. Supp. at 431.

57. E.g., Jurisdictional Statement of Appellant TOA at 7, 9, 12-18; Jurisdictional Statement of Appellants Friedman, et al. at 12-14.

find probative support in the present record, together with highly selective quotations from the testimony of two biased witnesses (each a TOA member) whose testimony the District Court necessarily did not find creditable on the subject at hand.⁵⁸

In actual fact there is no way that a licensed individual who practices optometry in Texas for a living can successfully "hide behind" a trade name. His identity is no more concealed when practicing under a trade name than it is when he is practicing under the employment of another optometrist which is also clearly lawful.⁵⁹ If, by some bizarre method, an optometrist actually led a patient to believe that the trade name, rather than the optometrist, was licensed to practice optometry, then surely this individual's license would be promptly revoked or suspended for misrepresentation in violation of Section 4.04(a)(2) of the Texas Optometry Act. Likewise his license would be subject to revocation or suspension if, in violation of Section 5.01 of the Act, he failed to "display his license or certificate in a conspicuous place in the principal office" of his optometry practice. In truth the trade name itself has no more bearing than price advertising on whether a given optometrist is bent on deception or inclined to cut corners. That problem really

58. Appellees respectfully invite the Court to read the *cross-examinations* of these two TOA witnesses, Dr. Waldman and Dr. Shannon. See Deposition of Dr. Nelson Waldman at 45, 47-48, 50, 53, 71-73; Deposition of Dr. Richard Shannon at 88-90, 92-93, 96-98, 100. The District Court's credibility determinations, of course, are not properly before this Court. In any event, the testimony of these two witnesses on cross-examination presents ample justification for finding their direct testimony, given at the instance of Appellants, widely off the mark of the trade name question.

59. Section 5.13(c), Texas Optometry Act (reproduced at Appendix A).

is one of licensing and professional standards, which are not at issue in this case.

Yet, Appellants complain that existing safeguards are insufficient—that, regardless of the office display of the optometrist's license, the patient will have already made an irrevocable decision to stay for a complete examination prior to entering the optometry premises.⁶⁰ Appellees fail to perceive how the optometrist's use or non-use of a trade name might affect this alleged state of affairs one way or the other. A patient so motivated is likely to behave the same way in either case. The patient has the same access to the identity of the attending optometrist in either case. Appellants' argument misses the point.

Appellants' real fear appears to be that people will patronize establishments operated under trade names with which people are familiar and in which they have confidence. That is surely no evil unto itself. *Linmark Associates v. Township of Willingboro*, *supra*, ___U.S. at ___, 97 S.Ct. at 1619, 52 L.Ed.2d at 164. If any room for concern exists, it can relate only to the possibility that a trade name—like price advertising—does not provide a *complete* foundation on which to select a practitioner. These concerns were answered dispositively, however, by this Court in *Bates v. State Bar of Arizona*, *supra*:

[I]t seems peculiar to deny the consumer, on the ground that the information is incomplete, at least *some* of the relevant information needed to reach an informed decision. The alternative—the prohibition of advertising—serves only to restrict the information that flows to consumers. Moreover, *the argument assumes that the public is not sophisticated*

60. Jurisdictional Statement of Appellant TOA at 17-18.

*enough to realize the limitations of advertising, and that the public is better kept in ignorance than trusted with correct but incomplete information. We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.*⁶¹

As this Court then observed, "the preferred remedy is more disclosure, rather than less".⁶² "More disclosure" to the consuming public is assuredly achieved when a trade name is used. The trade name efficiently provides the public with the cohesive package of information described by the court below, and it also informs the public that the user is employed by or associated with a particular sponsoring person, organization or firm. The consumer is at all times free to make his or her own decisions, based on his or her own perception of the sponsor's goodwill, whether to patronize the trade name user. In the meantime, the use of a trade name does not diminish to the slightest degree the user's existing legal obligation to make conspicuous disclosure of the individual optometrist's identity. Consequently, the issues in this case simply do not present a question of concealment of an optometrist's identity or "hiding behind" a trade name. The issues in this case go, instead, to whether the state may constitutionally deny the consumer *more* information about an optometrist's perfectly lawful business associations than the consumer would have without the information because the state assumes the consumer is "better off" without the information, or that the consumer

61. ____ U.S. at ____, 97 S.Ct. at 2704, 53 L.Ed.2d 829-830 (footnote omitted, emphasis added).

62. *Id.*

will act "irrationally" with it. See *Linmark Associates, supra*, ____ U.S. at ____, 97 S.Ct. at 1620, 52 L.Ed.2d 165.

(c) *The State of Texas Remains Free to Require Whatever Professional Standards It Wishes of Its Optometrists.*—The only state statute now at issue is the portion of Section 5.13(d) that effects a sweeping, blanket prohibition against the licensed Texas optometrist's practicing under, or using in connection with his practice, *any* trade name, corporate name.⁶³ By now it should be thoroughly obvious that high professional standards for Texas optometrists are, to a very substantial degree, guaranteed by the close regulation to which those optometrists are subject, as was the case with the pharmacists in *Virginia Pharmacy* and the lawyers in *Bates v. State Bar of Arizona*.

The state maintains, of course, substantial interests in the regulation of its professions and in promoting the public health and welfare. Because the state's interests are substantial, Appellees do not and need not contest the state's authority to set whatever professional standards it wishes of its optometrists, to subsidize them or to protect them from competition.

Appellees merely submit that the trade name ban constitutes another example of a state's attempt to protect the citizenry by keeping people in ignorance about a perfectly legal activity and perfectly legal business affiliations. Yet, the trade name ban does not directly affect

63. Unless, of course, the State of Texas intends to employ other provisions of the Texas Optometry Act not directly addressed to trade names, e.g., Section 5.11, but instead to commercial advertising generally and mode of practice, in an effort to suppress indirectly what the unconstitutional trade name ban suppresses directly. See part II, *infra*. Only the Appellants know their own intentions.

professional standards one way or another. It affects them only through the reactions that the Appellants assume people will have to the free flow of commercial information—i.e., Appellants fear that people will exercise their own informed, deliberate, private choices about whether, when and where to go for visual examinations and lenses.

The information conveyed by a trade name, however, is not in itself harmful; it clearly is relevant to those choices; and with more information in hand, rather than less, people may be expected to perceive their own best interests. Correspondingly, it can surely be assumed that most, if not all, trade name sponsors will have substantial interests in satisfying their customers and in advancing their goodwill. Otherwise the public will surely develop negative perceptions of the services and materials offered under the trade name and people will decline to patronize the trade name establishment.

This exercise of choice represents a vital thread in connecting fabric of our predominantly free enterprise economy. Through blanket suppression of trade name communication the state seeks to suppress an invaluable, harmless, convenient medium of information useful to the public for making personal economic decisions in connection with a perfectly legal activity. "[I]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Pharmacy, supra*, 425 U.S. at 770. The question, Appellees submit, simply admits of no material relationship to professional standards. Appellants' protestations

to the contrary⁶⁴ lack foundation in either reason or the record. They should be summarily rejected.

2. The Unconstitutionality of the Trade Name Ban Follows Directly from This Court's Decisions in the Advertising Cases.

(a) *The Free Flow of Commercial Information is Indispensable.*—The premise upon which speech that does "no more than propose a commercial transaction" is entitled to a measure of First Amendment protection was well-explained by this Court in *Virginia Pharmacy, supra*:

So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted]. *And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.*⁶⁵

The court below made specific, uncontested, now-binding factual findings that a trade name is encompassed within the meaning of commercial advertising and that a trade name communicates valuable consumer information "as to certain standards of price and quality, and availability of particular routine services".⁶⁶ As has been

64. Jurisdictional Statement of Appellants Friedman, et al. at 15.

65. 425 U.S. at 765 (emphasis added).

66. 438 F. Supp. at 430-431.

noted on several occasions herein, a trade name also *discloses* to the consuming public a business affiliation that is perfectly legal under Texas law.

Impressively, it does each of those things without relaxing to the slightest degree the professional responsibility and professional standards fixed for optometry by statutes totally independent of the trade name ban. Indeed, it is worthwhile at this point to recall that the very essence of optometry—the measurement of visual power—is itself regulated in Texas by a statute that sets forth in sequential order the specific steps of an optometric examination deemed “adequate” by the state legislature.⁶⁷ Apart from the trade name ban found at Section 5.13(d), the numerous protective features of the Texas Optometry Act govern all licensed Texas optometrists—trade name and non-trade name—in like manner and to like degree.

The foregoing considerations conclusively demonstrate that the District Court was correct in finding that a blanket trade name ban does not really address “dangers to the doctor/patient relationship”, or the “deterioration of the quality of eye care”, or the “practical ‘concealment’ of the optometrists’ identity”, or the “potential for deception and misrepresentation inherent in an assumed name practice”.⁶⁸ Instead, Section 5.13(d) of the Texas Optometry Act is directly calculated to force licensed optometrists to *conceal* from themselves and from their patients the real-life fact that they earn their livelihood in lawful association with a person, company or organization whose trade symbol triggers substantial, meaningful public

67. Section 5.12, Texas Optometry Act (reproduced at Appendix A).

68. 438 F. Supp. at 430.

perceptions. Cf. *Bates v. State Bar of Arizona*, *supra*, ___ U.S. at ___, 97 S.Ct. at 2701, 53 L.Ed.2d at 826. Yet, under this Court’s advertising decisions, the consumer is constitutionally entitled to his or her perceptions, and to that end the free flow of commercial information becomes indispensable.

(b) *A Trade Name Conveys “Basic Factual Content”, and More, With No Loss of Dignity.*—Certain of this Court’s analyses in the *Bates* decision, wherein the Court struck down a blanket prohibition of price advertising by lawyers, bear particular relevance to the question of commercial communication in optometry by means of a trade name. At an early stage of its First Amendment discussion in *Bates*, this Court took occasion to note that the Arizona State Bar’s criticism of fee advertising applied with little force to some of the “basic factual content” of advertising: the lawyer’s name, address, office hours, telephone and the like.⁶⁹ Appellees herein respectfully submit that a trade, corporate or assumed name utilized by a licensed Texas optometrist likewise conveys “basic factual content”—the optometrist’s association with the trade name sponsor—which is merely another item of information that the public is entitled to have readily at hand. That the trade name also connotes more than this “spartan fare” ought not be allowed to subtract from the public’s entitlement to its free availability as a message about who is offering what, where, and in what lawful business mode.

In *Bates* this Court then noted that bankers and engineers advertise, yet their professions are not considered “undignified”.⁷⁰ The fact is that bankers, engineers

69. ___ U.S. at ___, 97 S.Ct. at 2700, 53 L.Ed.2d at 825 n. 18.

70. ___ U.S. at ___, 97 S.Ct. at 2701-2703, 53 L.Ed.2d at 827.

and many other professionals—even medical doctors—also frequently practice under trade names. How is the public health or welfare affected differently when a licensed physician posts a sign over his office or places an advertisement calling his practice the “Women’s Center”, or a licensed lawyer practices his profession under the trade name “Legal Clinic”, or a licensed optometrist uses the trade name “Texas State Optical”? In simple fact the public health and welfare are not adversely affected in any of these examples. Instead, their effect is to reach out and service the community by more readily indicating the availability of the respective markets. That a given trade name, for example the TSO name, may also possess additional value to consumers through its reputational indications of the sponsor’s prices and the quality of the sponsor’s goods and services serves to advance, not subvert, society’s right to the opportunity to exercise informed choices.

(c) *The Evidence on Economic Effects and Quality of Eye Care.*—In the trial court the Appellees presented convincing expert testimony in support of these propositions. Dr. Lee Benham is a Professor of Economics at Washington University in St. Louis, Missouri.⁷¹ Dr. Benham, unlike the witnesses offered by Appellants, has absolutely no personal interest in whether optometrists should be permitted to use trade names in their practices. In discussing the utility of a commercial trade symbol as a form of valuable advertising, Dr. Benham testified:

71. This Court is already familiar with Dr. Benham’s studies on the effects of prohibitions of commercial advertising in professional fields. See *Bates v. State Bar of Arizona*, *supra*, ____ U.S. at ____, 97 S.Ct. at 2706, n. 34, 53 L.Ed.2d at 832.

As noted on page 423 of our October, 1975, article in the Journal of Law and Economics, “. . . the removal of commercial stimuli from the environment (including *advertising, brand name identification, and identification with well-known establishments*) limits consumers’ knowledge of current or potential alternatives and hence also limits their response to those alternatives”.⁷²

Dr. Benham gave the following explanation for his opinion:

One of the most valuable assets which individuals have in this large mobile country is their knowledge about trade names. Consumers develop a sophisticated understanding of the goods and services provided and the prices associated with different trade names. This permits them to locate the goods, services and prices they prefer on a continuing basis with substantially lower search costs than would otherwise be the case. This can perhaps be illustrated by pointing out the information provided by such names as Sears, Neiman-Marcus or Volkswagen. This also means that firms have an enormous incentive to develop and maintain the integrity of the products and services provided under their trade name[s]. The entire package they offer is being judged continuously by consumers on the basis of the samples they purchase.

If there were no trade names, individuals would have much greater difficulty obtaining information about the range of providers. They might know the providers in a given community well, but if they moved or if some of the providers move, the problems of acquiring new information would face them.

72. Deposition of Dr. Lee Benham taken May 3, 1976, at question 14 (emphasis added).

Without trade names, the generality of the information available would be reduced.

*For a product which is not frequently purchased, like eyeglasses, the restrictions on information may have particularly severe consequences.*⁷³

* * *

Thereafter, Dr. Benham focused specifically on the relationship between frequency of trade name communication and *consumer prices* for visual services and materials:

Restrictions on the use of trade name[s] will mean that consumers are less informed about their options. Prices will rise and, because of the higher prices, fewer people will obtain eyeglasses.

It is quite straightforward. Prices increase when consumers are less informed and competition decreases. Commercial providers can be hurt substantially if limitations are placed on the type of information they can provide to consumers. *Placing limits on the use of a trade name is one of the most effective ways of limiting the information provided.*

* * *

Our 1975 study in the Journal of Law and Economics finds that in states where less commercial information is available, (and trade names are an important part of this) the prices tend to be higher. In that study we also found that *the less well-educated consumers were more adversely affected by the restrictions on information than those with more education. The prices tend to go up for the less*

73. *Id.* at question 16 (emphasis added).

*educated, lower income individuals when such restrictions are imposed.*⁷⁴

* * *

Dr. Benham gave further testimony concerning the correlation, if any, between *quality of eye care* and the use of commercial trade names. He testified that he has personally examined this question and has found no systematic evidence to suggest that, for those who receive eye care, the quality of care is lowered in a trade name environment. Instead, Dr. Benham concluded, the quality of eye care will tend to be lower when the information conveyed by a trade name is repressed. Fewer people who need visual services and materials will obtain them, and many of those who do will obtain them less frequently.⁷⁵

Dr. Benham's observations that eye care prices tend to increase as commercial stimuli (including trade names) are repressed, and that no demonstrable linkage exists between use of a trade name and low-quality eye care, are solidly confirmed by the record in this case. The proof before the District Court irrefutably established that the non-commercial, non-trade name optometrists offered as witnesses by the Appellants charge routine vision examina-

74. *Id.* at question 18 (emphasis added). Cf. also *Virginia Pharmacy, supra*, 425 U.S. at 763:

"Appellees' case in this respect is a convincing one. Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet, they are the least able to learn, by shopping from pharmacist to pharmacist, where their scarce dollars are best spent".

75. Deposition of Dr. Lee Benham taken May 3, 1976, at questions 21, 26.

tion fees ranging from fifty percent to one hundred fifty percent in excess of the fees typically charged by TSO-affiliated optometrists and other trade name-affiliated "commercial" optometrists in Texas. Furthermore, the non-commercial, non-trade name optometrists customarily charge their patients certain additional fees for "services" related to dispensing optical merchandise (eyeglasses and contact lenses), which in reality are nothing more than disguised mark-ups on the commodities.⁷⁶

With respect to the question whether commercial merchandising techniques have led to any deterioration in the *quality* of eye care services or materials, the credible testimony in the record, which the District Court necessarily credited, is firmly to the effect that they have not.⁷⁷ Instead, the longtime dispute between the "commercial" and non-commercial factions in Texas optometry, which has largely been a dispute between the non-members and the members of Appellant TOA, has focused overwhelmingly on the use of *advertising* as a mode of doing business.⁷⁸ The restraints on advertising by optometrists in Texas, which include the suppression of practice under trade names, are rooted largely in habit and tradition, not

76. See Deposition of Dr. Nelson Waldman at 55, 60, 61-71; Deposition of Dr. James J. Riley at 119-121. See also Deposition of Dr. Hugh Sticksel, Jr. at 33, 34, 36-38; Deposition of Dr. John B. Bowen at 10-13; Deposition of Dr. E. Richard Friedman at 68-70, 96, 99, 116; Deposition of Dr. Chester Phieffer at 44-45, 84-85, 90, 94. Compare Deposition of Dr. N. Jay Rogers taken April 6, 1976, (hereinafter called "Rogers depo. II") at 120-125; Deposition of Dr. Sal Mora taken February 55, 1976, (hereinafter called "Mora depo. I") at 7-9.

77. Mora depo. I at 10-11; Rogers depo. I at 103; Rogers depo. II at 118-120; Deposition of Dr. E. Richard Friedman at 14-15.

78. *Id.* See also Dr. Friedman's deposition at 10-21, 102-104.

in present-day objective fact. As in *Bates*, *supra*, "habit and tradition are not in themselves an adequate answer to a constitutional challenge". ____ U.S. at ____, 97 S.Ct. at 2703, 53 L.Ed.2d at 828.

(d) *A Trade Name Is Not "Inherently" or "Inevitably" Misleading.*—Just as the State Bar of Arizona argued in *Bates* that price advertising of legal services would be "inherently misleading", Appellants herein argue, as they argued in the court below, that the use of a trade name in connection with multiple-office optometry would be "deceptive *per se*"—that it "would inevitably constitute 'puffing'".⁷⁹ Moreover, in an effort to escape this Court's dispositive reasoning in *Bates*, Appellants seize on the findings of the District Court that people identify a trade name with a "certain *quality* of service and goods", and that the TSO name has come to communicate "certain standards of . . . *quality* . . . of particular routine services."⁸⁰

In *Bates*, of course, this Court took care to lay aside "the peculiar problems associated with advertising claims relating to the *quality* of legal services", noting that such claims might be deceptive, misleading or even false since they "are not susceptible to precise measurement or verification".⁸¹ Appellees readily accept the validity of these observations. For several important reasons, however, Appellants must fail in their efforts to extend those observations to the case presented by this record.

79. Jurisdictional Statement of Appellants Friedman, et al. at 11.

80. 438 F. Supp. at 431 (emphasis added).

81. ____ U.S. at ____, 97 S.Ct. at 2700, 2709, 53 L.Ed.2d at 825 (emphasis added). To similar effect see *Virginia Pharmacy, supra*, 425 U.S. at 771 n. 24.

In the first place, a vast difference exists between an advertising *claim* relating to the quality of an article or a service and the public's *perceptions* of the quality possessed by an article or service as a function of source symbol identification. Specifically, nowhere have Appellants contended that the source symbol "Texas State Optical" or "TSO" purports by its own syntax to state *any* claim to *any* palpable degree of quality. The case might be different if the trade name in question were "Perfect Vision" or "Top-Notch Optical". But if that were the case, Appellees would not quarrel for a moment with the state's authority to suppress such a deceptive trade symbol. Surely the District Court would have felt the same way.

Perhaps it is because Appellants realize that the case actually presented is not the case they wish the Court to see that Appellants do not contend the TSO name itself to be deceptive or misleading to the public. This omission is in sharp contrast to the State Bar of Arizona's argument, rejected by this Court in *Bates*, that the trade name "Legal Clinic" constituted misleading advertising.—— U.S. at —, 97 S. Ct. at 2708, 53 L.Ed.2d at 834.

Second, Appellants have simply failed to take account of the nature of the communicative role played in our society by a bona fide, non-deceptive, non-coercive, in-offensive trade symbol. A trade name is but a variation of a trademark.

To some extent the two terms overlap, but there is a difference, more or less definitely recognized, which is that, generally speaking, the [latter] is applicable to the vendible commodity to which it is affixed, the [former] to a business and its goodwill. [Citation

omitted]. A corporate name seems to fall more appropriately into the [former] class. But the precise difference is not often material, since the law affords protection against its appropriation in either view, upon the same fundamental principles.⁸²

Thus, either a trade name or a trademark is "merely a convenient means for facilitating the protection of one's goodwill in trade",⁸³ the "primary and proper function of [which] is to identify the origin or ownership"⁸⁴ of the goods or services sponsored thereunder. "In short, the trademark [or trade name] is treated as merely a protection for the goodwill, and not the subject of property except in connection with an existing business".⁸⁵

Yet, for many years the common-law of every state in the union has afforded considerable legal protection to valid trademarks and trade names.⁸⁶ Additional protection for a trade name that also functions as a trademark or service mark in commerce is available through the registration procedures provided by Congress in the Lanham Act.⁸⁷ These state and federal protections exemplify "the law's recognition of the psychological value of symbols. If it is true that we live by symbols, it is no

82. *American Steel Foundries v. Robertson*, 269 U.S. 372, 380 (1926).

83. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918).

84. *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413 (1916).

85. *Id.*, 240 U.S. at 415.

86. See generally 1 J. McCarthy, *Trademarks and Unfair Competition*, Section 9:1 (1973).

87. 15 U.S.C. Section 1051 *et seq.* See *McCarthy, supra*, Section 9:6.

less true that we purchase goods [and services] by them."⁸⁸

In this litigation the State of Texas has elected to take the truly extreme position that *all* trade names in an entire professional economic marketplace are so "inevitably" misleading that none deserves protection. If such a contention possessed the slightest merit would the law of unfair competition in general have developed with great consistency, as it has, over the past seventy years in fifty states—with the courts standing ready to grant injunctions and damages against infringers? Would not those courts have asked, at least on occasion, whether the infringer's "investment in advertising and quality control which is often considerable"⁸⁹ was really worth protecting?

In fact, courts have had occasion to ask that question. Interestingly, their responses have remarkably resembled, in functional terms, Justice Brandeis's classic admonition in the First Amendment case of *Whitney v. California*:⁹⁰

If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence.⁹¹

88. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203, 205 (1942).

89. *Beer Nuts, Inc. v. King Nut Company*, 477 F.2d 326, 328 (6th Cir. 1973).

90. 274 U.S. 357 (1927).

91. *Id.*, 274 U.S. at 377 (concurring opinion), quoted in *Linmark Associates, Inc. v. Township of Willingboro*, *supra*, ____ U.S. at ____, 97 S.Ct. at 1620, 52 L.Ed.2d at 164-165.

In *Smith v. Chanel, Inc.*,⁹² for example, the court held that, in the absence of misrepresentation or confusion as to source or sponsorship, a seller in promoting his own goods may freely use the trademark of another to compare his goods with the other's. This holding was said to rest on the public policy favoring a free, competitive economy in which the trademark owner is properly exposed to, not insulated from, the pressures of price and quality competition. Similarly, in *De Costa v. Columbia Broadcasting System, Inc.*,⁹³ the court explained that source symbol:

[p]rotection at present has *the merits of inherent limitations*: the existence of a trade, business, or profession where the "good-will" to be protected has been subjected to *the acid test of the willingness of people to pay for goods or services*;

* * *

Furthermore, the question has not gone unnoticed by the Congress, although again the solution prescribed is a sensible and selective one—not a capricious brickbat approach as Appellants desire. Specifically, under the Lanham Act a source symbol that "consists of or comprises . . . deceptive . . . matter" is unregistrable on either the Principal Register or the Supplemental Register.⁹⁴

92. 402 F.2d 562, 569 (7th Cir. 1968).

93. 520 F.2d 499, 513 (1st Cir. 1975) (emphasis added). Cf. also *Prestonettes v. Coty*, 264 U.S. 359, 369 (1924): "If the defendants' rebottling the plaintiff's perfume deteriorates it and the public is adequately informed who does the rebottling, the public, with or without the plaintiff's assistance, is likely to find it out".

94. 15 U.S.C. Sections 1052(a), 1091. In the leading case of *Gold Seal Co. v. Weeks*, 129 F. Supp. 928, 934 (D.D.C. 1955), affirmed 230 F.2d 832 (D.C. Cir. 1956), the court said "deception

The proprietor of such a mark is thereby deprived of the Act's notice provisions and remedies as against infringing competitors. This deprivation must surely constitute an enormous dis-incentive to adopt and use a deceptive trade symbol.

In conclusion, Appellees respectfully submit that Appellants have overlooked the law's existing sensitivity to their "quality" concerns, and that abundant sources of legal authority, free market self-interest and common sense stand available, independently of the blanket trade name ban, to deal effectively with deceptive or misleading source symbols. Simultaneously, however, Appellees are unprepared to accept the premise that American courts and the United States Congress have protected hundreds, perhaps thousands, of "inevitably" misleading trade names over the past seventy years. If *all* trade names become "inevitably" misleading when used in connections with optometry, then surely we must presume—without the slightest substantiating experience or authority—that the same evil infects innumerable other fields of trade, commerce and professional endeavor, and Appellants herein are the first to discover it.

Third, it must be remembered that the consumer's mental associations evoked by a trade symbol may be unfavorable as well as favorable. To the extent a trade name user engages in practices that evoke favorable associations, the trade name itself may *thereby* come to symbolize the association and may *thereby* encourage patronage. If, on the other hand, the trade name users

is found when an essential and material element is misrepresented, is distinctly false, and is the very element upon which the consumer relies in purchasing one product over another".

do a poor job of engaging in favorable practices or permits their competition to outperform their establishments, then the sponsor's trade name may come to symbolize ill will and discourage further patronage. In these important respects, clearly, it is more probable that the consumer will be in a position to make an informed decision with the trade name than without it.

In response to Appellants' concerns, Appellees would readily agree that the public ought to be able to expect a minimum degree of quality and skill on the part of visual practitioners. That is precisely what the Texas licensing and continuing optometric education laws are designed to allow. Beyond the minimum level, however, a given member of the public may or may not associate any *additional* degree of quality or skill with a practitioner's trade name—whether the professional be a doctor, a lawyer, a banker, an engineer, a pharmacist, an optometrist or otherwise.

Quality and skill are but a few of the many discrete elements—for example integrity, accessibility, prices, ready transferability of records, availability of adjustments or refunds, credit without additional cost, efficiency of operation, courtesy, reliability, convenient hours, single location for complete care and a plethora of other elements—that the public has legitimately come to associate with the trade name, Texas State Optical. It is surely a tribute to the ability and the standards demonstrated over the past forty years by Dr. Rogers that the TSO name has come to symbolize a high degree of quality and skill on the part of TSO-affiliated practitioners. Beyond that proven fact, however, it cannot reasonably be argued that a trade name, in the abstract, signifies

any degree of quality or skill above that required in order to maintain a license to practice optometry, which every licensed optometrist is required to post in his office in any event.

Strictly speaking, then, all Texas optometrists, regardless of whether they use a trade name, have the same opportunities to acquire a reputation for quality. The trade name itself merely constitutes a convenient, efficient medium of harmless, valuable commercial information readily available for utilization by those consumers who choose to identify with it.⁹⁵ If a particular trade name also happens to evoke perceptions as to quality, or lack thereof, then so be it. The State properly ought to have the power to suppress this efficient medium of information and the useful perceptions it evokes only when the trade symbol itself is deceptive or misleading, which of course has never really been an issue with respect to the TSO name involved in this case. See *Virginia Pharmacy, supra*, 425 U.S. at 771, n. 24. That being so, the unconstitutionality of Section 5.13(d) of the Texas Optometry Act follows directly and naturally from this Court's recent advertising decisions.

95. Just as it is unlikely that many people go to a lawyer in order to find out whether they have a clean bill of health, it is unlikely that many people go to an optometrist in order to find out whether they have blurred vision. The lawyer's client may not fully appreciate the detail involved in the lawyer's diagnostic role, but the client who needs a will or a divorce is usually able to identify the service he or she desires at the level to which price advertising lends itself. *Bates v. State Bar of Arizona, supra*, ____ U.S. at ____, 97 S.Ct. at 2704, 53 L.Ed. at 829. This is also certainly true of the relationship between the patient with blurred vision and the level to which a Texas optometrist's office marked by a Texas State Optical sign lends itself.

3. The Insufficiency of the Carp Case as Justification for the Trade Name Ban.

Appellants rely almost fanatically on the case of *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (Tex. Sup. 1967) but, as the three-judge court noted, that reliance is misplaced for several reasons. 438 F. Supp. at 430.

In *Carp* the Texas Supreme Court considered the question of whether the Board of Examiners had exceeded its statutory powers by adopting the Professional Responsibility Rule which included a ban on the practice under trade names. The Court's holding was simply that the Board had not exceeded its statutory rule-making powers by adopting the rule.

As the three-judge court noted there were no federal constitutional questions raised or addressed in the *Carp* case and the case was decided almost ten years before the decisions of this Court in the *Virginia Pharmacy* and *Bates* cases. In *Virginia Pharmacy* the price advertising statute had been upheld by a federal district court in a suit that actually raised First Amendment objections to the statute but was decided primarily on Due Process and Equal Protection grounds. The finding of the district court in *Patterson Drug Co. v. Kingery*, 305 F. Supp. 821 (W.D. Va. 1969) that the dispensation of prescription drugs "affects the public health, safety and welfare," *Id.* at 824-825, did not prevent this Court from examining the evidence in the *Virginia Pharmacy* case under First Amendment standards and holding that the statute banning advertising unconstitutional. When the evidence in this case is similarly judged by First Amendment standards the trade name prohibition must also fail.

The persuasive impact of *Carp* is weakened even further upon examination of the dissenting opinion of Justice Smith. Even though Justice Smith was not applying the stringent First Amendment standards that must be used in this case he found that "[t]here is no evidence that the practice of optometry under trade or assumed names in multiple offices injuriously affects the public health." 412 S.W.2d at 317. Justice Smith noted that there was "a complete absence of testimony given by patients or others which even remotely suggested that the care given to patients in Respondents' establishments located throughout the State was any less satisfactory to the patient, than the care given in the offices of individual practitioners." *Id.*

In this case there is also a complete lack of testimony from consumers or any individuals other than optometrists that practice under a trade name is injurious to the public. In fact, even the testimony of the optometrists given on behalf of Appellants was little more than speculation as to possible problems resulting from a trade name practice.

The ten year old *Carp* case is completely and totally insufficient as a justification for the trade name ban. The evidence presented to the three-judge court established that the trade name ban cannot be justified on grounds that it is necessary to protect the public and in fact established that the ban actually harms the public.

4. The Blanket Trade Name Ban May Not Be Justified as a Mere Time, Place or Manner Limitation on Free Commercial Speech.

Appellants present for the first time in their Jurisdictional Statement the argument that the prohibition of

practice under a trade name is justified as "a valid restriction on the manner of expression." See Appellants' Jurisdictional Statement p. 15. In support of this argument they quote language from the *Virginia Pharmacy* case to the effect that time, place and manner restrictions have often been upheld but they fail to include the rest of the paragraph which reads:

Whatever may be the proper bounds of time, place and manner restrictions on commercial speech, they are plainly exceeded by this Virginia statute which singles out speech of a particular content and seeks to prevent its dissemination entirely. 425 U.S. at 771 (emphasis added).

Here, as in *Virginia Pharmacy*, the state has singled out speech of a particular content, trade name information, and "seeks to prevent its dissemination completely."

The prohibition of Section 5.13(d) is absolute. It does not ban only deceptive trade names or the means by which a trade name might be conveyed to the public. The time, manner and place restrictions that have been upheld by this Court have not totally prohibited the dissemination of particular information. Compare *Kovacs v. Cooper*, 336 U.S. 77 (1949) (statute restricting the use of loudspeakers to broadcast information); *Adderly v. Florida*, 385 U.S. 39 (1966) (upholding a trespass statute as a valid restriction on place of demonstrations); *Gragned v. City of Rockford*, 408 U.S. 104 (1972) (statute prohibiting loud noise near schools); and *Cox v. New Hampshire*, 409 U.S. 109 (statute requiring issuance of parade permits).

This Court has implicitly recognized that trade names such as "Women's Pavilion" and "Legal Clinic" convey

information to the public and are not inherently misleading. *Bigelow v. Virginia*, 412 U.S. 809 at 822 (1975) and *Bates*, ____ U.S. ____, 97 S.Ct. ____, 53 L.Ed.2d at 834 (1977). An outright prohibition of trade names single out speech of that particular content and effectively prevents the public from receiving it in any form.

The case of *Linmark Associates, Inc. v. Township of Willingboro*, ____ U.S. ____, 97 S.Ct. ____, 52 L.Ed.2d 155 (1977) presents an extremely helpful analysis of time, place and manner restrictions. In *Linmark* an ordinance prohibited the use of "For Sale" signs on the front lawns of houses. In rejecting the contention that the ordinance was a valid time, place or manner restriction the Court noted two important considerations. ____ U.S. ____, 97 S.Ct. ____, 52 L.Ed.2d at 162.

First the Court considered whether or not the ordinance left open ample alternative channels for communication. The alternatives available to use of "For Sale" signs, such as newspaper advertising and listing with real estate agents involved more cost and were less effective media for conveying the message of a "For Sale" sign. Similarly, the alternatives to the use of a trade name are also unsatisfactory. Costs of advertising will increase if each optometric office must advertise separately rather than having a single trade name advertisement that benefits several offices. More importantly, there are no other truly effective means for conveying the message found in a trade name. Buyers of housing look for "For Sale" signs and consumers in the marketplace look for trade names when they seek goods and services. The prohibition of practice under a trade name, just as the prohibition of "For Sale" signs, does not leave open ample alternative channels for communication.

The Court in *Linmark* also considered whether the ordinance in question was genuinely concerned with the place of speech and concluded that it was not. The Court concluded that:

"Willingboro has proscribed particular types of signs based on their content because it fears their "primary" effect that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication does not transform this into a time, place or manner case. ____ U.S. ____, 97 S.Ct. ____, 52 L.Ed.2d at 163.

The State here is also restricting trade names because of their "primary effect" which is to induce consumers to act upon the information, that is, spend their dollars with the optometrist who practices under a trade name. That the prohibition only applies to trade name usage does not transform this case into a time, place or manner case and the statute cannot be sustained as a valid restriction on time, place and manner, because it is no more than a blanket suppression of speech content.

II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE DISTRICT COURT PRESENT NO BARRIER TO SUMMARY AFFIRMANCE.

The authorities cited by Appellants⁹⁶ for the proposition that the District Court's injunction is too broad in scope are not in point. The *United Transportation Union*⁹⁷

96. Appellants' Jurisdictional Statement, pp. 17-18.

97. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 581 (1971).

and *Korematsu*⁹⁸ cases involved situations where lower courts had gone beyond the record in framing their decrees, the effect being impermissibly to invade constitutionally protected rights. The *Solesbee*⁹⁹ case simply stands for the elementary proposition that courts will not reach constitutional issues not fairly raised by the evidence.

An instructive case is *Green v. Connally*, 330 F. Supp. 1150 (D. D.C. 1971, Three-Judge Court), *aff'd sub nom. Coit v. Green*, 92 S.Ct. 564 (1971). Plaintiffs, Negro taxpayers in Mississippi, sued the Internal Revenue Service for injunctive and declaratory relief on the theory that the granting of tax-exempt status to racially-segregationist private schools was in violation of the Internal Revenue Code or, alternatively, that sections 170 and 501 of the Code violated the Constitution. Parents of white students attending the private schools intervened in support of IRS, but IRS suddenly announced a change in its interpretation of the law so as to agree with the plaintiffs on the major issues. The Court then concluded that it agreed with the IRS's new position, and IRS argued that the suit was moot or else plaintiffs were entitled only to very limited declaratory relief.

The Court disagreed with IRS, stating:

In the context of this case we cannot limit the protection of plaintiffs' rights to a mere declaration of the proper construction of the Internal Revenue Code. Taking into account the conditions in Mississippi which have already led to denial of plain-

98. *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 222 (1944).

99. *Solesbee v. Balkcom*, 339 U.S. 9, 11 (1950).

tiffs' rights in the past, we conclude that protection to which they are entitled includes effective "directives and procedures satisfactory to this Court that the school (receiving tax exemption and deductibility) is not part of a system of private schools operated on a racially segregated basis." 330 F. Supp. at 1171.

The Court proceeded to formulate a lengthy and detailed injunction against IRS so as to "protect plaintiffs from vitiation of their right to be free of the consequences of Government support of racially discriminatory schools, private or public." 330 F. Supp. at 1177.

The Court was charged and remains concerned with avoiding vitiation of that right by *either a construction or an application* that undermines the protection of the rights safeguarded by the Code as properly construed. *Id.* (emphasis added)

The Court's concern with affording complete relief represented nothing out of the ordinary for federal courts, nor did it turn on the fact that the case involved overtones of racial discrimination. This point is demonstrated by the authorities cited by the Court:

"A Court of equity ought to do justice completely, and not by halves." *Camp v. Boyd*, 229 U.S. 530, 551, 33 S.Ct. 785, 793, 57 L.Ed. 1317 (1913). In *Bell v. Hood*, 327 U.S. 678, 684, 66 S.Ct. 773, 777, 90 L.Ed. 939 (1946), the Court recognized that this principle has particular vigor "where federally protected rights have been invaded" and in such cases "Courts will be alert to adjust their remedies so as to grant the necessary relief." 330 F. Supp. at 1177.

In *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086 (1946), the Supreme Court described the authority of a Court of equity:

It may act so as to adjust and reconcile competing claims and so as to afford full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced. In addition, the Court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. 328 U.S. at 398, 66 S.Ct. at 1089.

And, as was observed in *Alexander v. Hillman*, 296 U.S. 222, 239, 56 S.Ct. 204, 209-210 (1935):

The ancillary bill is not an original bill for the commencement of a suit, That it was not so intended is shown by the fact that process was not prayed or issued. While in form not inappropriate for commencement of suit, it was in fact formulated and filed to serve as a pleading in the main suit to put respondents to proof of their claims and to assert the right to affirmative relief. *Treating their established forms as flexible, courts of equity may suit proceedings and remedies to the circumstances of cases and formulate them appropriately to safeguard, conveniently to adjudge, and promptly to enforce substantial rights of all parties before them.*

The Court added: "That requirement is in harmony with the rule generally followed by Courts of equity that, having jurisdiction of the parties to controversies brought

before them, they will decide all matters in dispute and decree complete relief." 296 U.S. at 242, 56 S.Ct. at 211. Further, "One of the duties of such a court is to prevent a multiplicity of suits . . ." *Camp v. Boyd*, 229 U.S. 530, 552, 33 S.Ct. 785, 793 (1913).

The foregoing authorities clearly establish that the trial court had both the power and the duty in this case to render a complete decree which will fully and finally effectuate the intent of the Court's Memorandum Opinion. Furthermore, Appellees' (Plaintiffs') pleadings should be deemed as having been amended to conform to evidence relevant to issues tried by consent. The record of this case, relating to price advertising and trade or assumed name practice by optometrists, is voluminous. Every aspect of these activities known to Appellant and Appellees was explored at length in testimony and presented in great detail in trial briefs.

Fortunately for all, litigation in the federal courts is no longer a game of artful pleading. Rule 15(b) of the Federal Rules of Civil Procedure is in point and provides in pertinent part as follows:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

* * *

The above rule frequently operates in tandem with Rule 54(c), which states in pertinent part:

Except as to a party against whom a judgment is entered by default, *every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.* (emphasis added).

The federal courts, and particularly the Fifth Circuit Court of Appeals, have had many occasions to apply Rules 15(b) and 54(c). The consistent ruling is that Rules 15(b) and 54(c) must be applied *liberally* unless the omission in pleading was due to bad faith, conscious indifference or other inexcusable conduct *and* unless the party opposing amendment can show some actual prejudice from the delay. See, e.g., *Wallin v. Fuller*, 5 Cir. 1973, 476 F.2d 1204; *Longbottom v. Swaby*, 5 Cir. 1968, 397 F.2d 45; *Fey v. Walston & Co., Inc.*, 7 Cir. 1974, 493 F.2d 1036, 1050.

In this case it is submitted that the operative facts and controlling law are such that Appellants could not have suffered *any* prejudice from Appellees lack of pleading. If the facts show that optometrists are restrained by statute from exercising a right to advertise their prices to the public and from practicing under a trade or assumed name, and according to the law the restraint is void, then for all practical purposes the Appellants bear the same defense burden regardless whether the restriction is effected by one statute, two statutes or ten statutes. What conceivable additional proof could Appellants have adduced had Appellees pleaded additional sections of the

Texas Optometry Act? Appellants have not suggested any, and Appellees submit there is none.

Note that Rule 15(b), with respect to amendments to conform to the evidence, requires either *express or implied consent* to trial of issues upon which the evidence is relevant. In the Fifth Circuit the leading case in point is *Wallin v. Fuller*, *supra*, 476 F.2d 1204. There the suit, an Alabama diversity action, was pleaded on the theory of ordinary negligence. The pretrial order specified that the issues would be ordinary negligence and ordinary contributory negligence. At trial, however, plaintiff's attorney introduced portions of defendant's deposition which indicated that if plaintiff had been guilty of contributory negligence, defendant may have been guilty of subsequent negligence (similar to "last clear chance"). Defense counsel did not object; indeed, neither attorney drew the trial court's attention to the issues outside the pleadings and pretrial order until after both sides had rested. Plaintiff then requested leave to amend so as to get the issue of subsequent negligence before the jury on the ground that it was tried by consent. The trial court denied leave in reliance on the pretrial order. The jury found for defendant.

On appeal the Fifth Circuit reversed and remanded for a new trial, holding that Rule 16 on pretrial procedure must give way to a liberal application of Rule 15(b). The factors discussed by the Fifth Circuit directly fit the issues now before this Court:

Under the standards of Rule 15(b) the defendant *impliedly consented* to the trial of issues outside the pretrial order, and the pleadings should therefore

have been amended. *A substantial quantity of evidence tending to establish subsequent negligent or wanton conduct* was brought before the jury, through the deposition of Mayes and the testimony of Fuller, *without objection by defense counsel.* * * * Having deposed Mayes well in advance of the trial, *defense counsel cannot complain of having been unaware that the evidence might tend to establish subsequent negligence and wantonness.* In these circumstances the failure of the defense to seek to limit the evidence during the trial in accordance with the pretrial order *establishes consent to the trial of these issues.* 476 F.2d at 1210 (emphasis added).

If anything, the instant case is stronger for a Rule 15(b) amendment than *Wallin v. Fuller*. Here no pretrial order was entered and Appellees made no stipulation as to the issues. Here *most* of the record is devoted to commercial optometric practice, not just a "substantial quantity." Here Appellants took not one, but two, inch-thick depositions of Dr. N. Jay Rogers. In sum, the Appellants' failure to object or seek any limiting order from the Court clearly outweighs appellees' failure to plead more specifically.

This is a proper instance for application of the familiar rule that, "Once an answer is filed, relief depends not on the matters within the precise issues of the pleadings from a technical standpoint, but by the evidence actually received." *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968).

CONCLUSION

The Judgment of the District Court is entirely correct with respect to the unconstitutionality of Texas statutory provisions that deny licensed optometrists and consumers the benefits of trade name communication. Any holding to the contrary would conflict directly with the essential reasoning of this Court's commercial advertising decisions. Furthermore, it would stand this record on its head. The First Amendment interests implicated by a trade name possess indisputably substantial value for traders and consumers; a trade name is unmatched as an efficient medium of useful economic information; and, far from representing an unusual or somehow suspect variety of advertising, a trade name is a highly traditional form of legally-protected communication. The decision of the District Court is narrow—its limits are readily visible, the economic activity at the heart of this case—"commercial" optometry—is a perfectly legal activity in the State of Texas. Finally, the District Court's injunction and Orders Pendente Lite are thoroughly justified and ought not now be disturbed.

WHEREFORE, PREMISES CONSIDERED, Appellees respectfully move that this Court summarily affirm the District Court's Judgment as the contentions of Appellants are so unsubstantial as to warrant no further argument. In the alternative, Appellees urge the Court to take no action herein without the benefit of full argument and

plenary consideration of both appeals now pending on this Court's docket in consequence of the Judgment below.

Respectfully submitted,

ROBERT Q. KEITH
BRIAN R. DAVIS
VICTOR J. ROGERS, II
ARTHUR R. ALMQUIST

By: _____
Of Counsel

Of Counsel:

MEHAFFY, WEBER, KEITH & GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

DELEON & DAVIS
408 First Federal Plaza
Austin, Texas 78701

VICTOR J. ROGERS, II
3434 One Allen Center
Houston, Texas 77002

CERTIFICATE OF SERVICE

A true and correct copy of the above and foregoing has been furnished to all interested parties this _____ day of March, 1978.

ROBERT Q. KEITH

APPENDIX A

Art. 4552-2.02. Definitions

As used in this Act:

(1) The "practice of optometry" is defined to be the employment of objective or subjective means, without the use of drugs, for the purpose of ascertaining and measuring the powers of vision of the human eye, and fitting lenses or prisms to correct or remedy any defect or abnormal condition of vision. Nothing herein shall be construed to permit optometrists to treat the eyes for any defect whatsoever in any manner nor to administer nor to prescribe any drug or physical treatment whatsoever, unless such optometrist is a regularly licensed physician or surgeon under the laws of this state. Nothing herein shall be construed to prevent selling ready-to-wear spectacles or eyeglasses as merchandise at retail, nor to prevent simple repair jobs.

Art. 4552-2.10. Proceedings; subpoenas; oaths

The board, any committee, or any member thereof, shall have the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and the production of books, records and documents, to administer oaths and to take testimony concerning all matters within its or his jurisdiction. The board shall not be bound by strict rules of procedure or by the laws of evidence in the conduct of its proceedings but the determination shall be founded upon sufficient legal evidence to sustain it.

Art. 4552-3.02. Application

(a) The applicant shall make application, furnishing to the secretary of the board, on forms to be furnished by the board, satisfactory sworn evidence that he has attained the age of 21 years,¹ is of good moral character, is a citizen of the United States, and has at least graduated from a first grade high school, or has a preliminary education equivalent to permit him to matriculate in The University of Texas, and that he has attended and graduated from a reputable university or college of optometry which meets with the requirements of the board, and such other information as the board may deem necessary for the enforcement of this Act.

(b) A university or school of optometry is reputable whose entrance requirements and course of instruction are as high as those adopted by the better class of universities and schools of optometry and whose course of instruction shall be equivalent to not less than six terms of eight months each, and approved by the board. Provided, however, that the provisions of this subsection shall only apply to those students enrolling in school from and after the effective date of this Act.

Art. 4552-3.05. Subjects of examination

The examination shall consist of written, oral or practical tests, in practical, theoretical, and physiological optics, in theoretical and practical optometry, and in the anatomy, physiology and pathology of the eye as applied to optometry and in such other subjects as may be regularly taught in all recognized standard optometric universities or schools.

Art. 4552-4.01B Educational requirement for renewal

(a) Each optometrist licensed in this state shall take annual courses of study in subjects relating to the utilization and application of scientific, technical, and clinical advances in vision care, vision therapy, visual training, and other subjects relating to the practice of optometry regularly taught by recognized optometric universities and schools.

(b) The length of study required is 12 hours per calendar year.

(c) The continuing education requirements established by this section shall be fulfilled by attendance in continuing education courses sponsored by an accredited college of optometry or in a course approved by the board. Attendance at a course of study shall be certified to the board on a form provided by the board and shall be submitted by each licensed optometrist in conjunction with his application for renewal of his license and submission of renewal fee.

(d) The board may take action necessary in order to qualify for funds or grants made available by the United States or an agency of the United States for the establishment and maintenance of programs of continuing education.

(e) Licensees who have not complied with the requirement of this section may not be issued a renewal license, except for the following persons who are exempt:

(1) a person who holds a Texas license but who does not practice optometry in Texas;

(2) a licensee who served in the regular armed forces of the United States during part of the 12 months immediately preceding the annual license renewal date;

(3) a licensee who submits proof that he suffered a serious or disabling illness or physical disability which prevented him from complying with the requirements of this section during the 12 months immediately preceding the annual license renewal date; or

(4) a licensee first licensed within the 12 months immediately preceding the annual renewal date.

Art. 4552-4.04. Revocation, suspension, etc.

(a) The board may, in its discretion, refuse to issue a license to any applicant and may cancel, revoke or suspend the operation of any license if it finds that:

(1) the applicant or licensee is guilty of gross immorality;

(2) the applicant or licensee is guilty of any fraud, deceit, dishonesty, or misrepresentation in the practice of optometry or in his seeking admission to such practice;

(3) the applicant or licensee is unfit or incompetent by reason of negligence;

(4) the applicant or licensee has been convicted of a felony or a misdemeanor which involves moral turpitude;

(5) the applicant or licensee is an habitual drunkard or is addicted to the use of morphine, cocaine or other drugs having similar effect or has become insane or has been adjudged by a court of competent jurisdiction to be of unsound mind;

(6) the licensee has directly or indirectly employed, hired, procured, or induced a person, not licensed to practice optometry in this state, to so practice;

(7) the licensee directly or indirectly aids or abets in the practice of optometry any person not duly licensed to practice under this Act;

(8) the licensee directly or indirectly employs solicitors, canvassers or agents for the purpose of obtaining patronage;

(9) the licensee lends, leases, rents or in any other manner places his license at the disposal or in the service of any person not licensed to practice optometry in this state;

(10) the applicant or licensee has willfully or repeatedly violated any of the provisions of this Act;

(11) the licensee has willfully or repeatedly represented to the public or any member thereof that he is authorized or competent to cure or treat diseases of the eye;

(12) the licensee has his right to practice optometry suspended or revoked by any federal agency for a cause which in the opinion of the board warrants such action;

(13) the applicant or licensee has been finally convicted of violation of Article 773 of the Penal Code.¹

(b) Proceedings under this section shall be begun by filing charges with the board in writing and under oath. Said charges may be made by any person or persons. The chairman of the board shall fix a time and place for a hearing and shall cause a copy of the charges, together

with a notice of the time and place fixed for the hearing, to be served on the respondent or his counsel at least 10 days prior thereto. When personal service cannot be effected, the board shall cause to be published once a week for two successive weeks a notice of the hearing in a newspaper published in the county wherein the respondent was last known to practice, and shall mail a copy of the charges and of such notice to the respondent at his last known address. When publication of the notice is necessary, the date of hearing shall not be less than 10 days after the last date of the publication of the notice.

(c) At said hearing the respondent shall have the right to appear either personally or by counsel, or both, to produce witnesses and evidence on his behalf, to cross examine witnesses and to have subpoenas issued by the board. The board shall thereupon determine the charges upon their merits.

(d) Any person whose license to practice optometry has been refused or has been revoked or suspended by the board may, within 20 days after the making and entering of such order, take an appeal to any of the district courts of the county of his residence, but the decision of the board shall not be stayed or enjoined except upon application to such district court after notice to the board.

(e) Upon application, the board may reissue a license to practice optometry to a person whose license has been revoked but such application shall not be made prior to one year after the revocation and shall be made in such manner and form as the board may require.

(f) Nothing in this Act shall be construed to prevent the administrator or executor of the estate of a deceased

optometrist from employing a licensed optometrist to carry on the practice of such deceased during the administration of such estate nor to prevent a licensed optometrist from working for such person during the administration of the estate when the legal representative thereof has been authorized by the county judge to continue the operation of such practice.

Art. 4552-5.01. Display of license

Every person practicing optometry in this state shall display his license or certificate in a conspicuous place in the principal office where he practices optometry and whenever required, exhibit such license or certificate to said board, or its authorized representative, and whenever practicing said profession of optometry outside of, or away from said office or place of business, he shall deliver to each person fitted with glasses a bill, which shall contain his signature, post-office address, and number of his license or certificate, together with a specification of the lenses and material furnished and the prices charged for the same respectively.

Art. 4552-5.04. Practice without license; fraud; house-to-house

It shall be unlawful for any person to:

(1) falsely impersonate any person duly licensed as an optometrist under the provisions of this Act or to falsely assume another name;

(2) buy, sell, or fraudulently obtain any optometry diploma, license, record of registration or aid or abet therein;

(3) practice, offer, or hold himself out as authorized to practice optometry or use in connection with his name any designation tending to imply that he is a practitioner of optometry if not licensed to practice under the provisions of this Act;

(4) practice optometry during the time his license shall be suspended or revoked;

(5) practice optometry from house-to-house or on the streets or highways, notwithstanding any laws for the licensing of peddlers. This shall not be construed as prohibiting an optometrist or physician from attending, prescribing for and furnishing spectacles, eyeglasses or ophthalmic lenses to a person who is confined to his abode by reason of illness or physical or mental infirmity, or in response to an unsolicited request or call, for such professional services.

Art. 4552-5.05. Treating diseased eyes

Anyone practicing optometry who shall prescribe for or fit lenses for any diseased condition of the eye, or for the disease of any other organ of the body that manifests itself in the eye, shall be deemed to be practicing medicine within the meaning of that term as defined by law. Any such person possessing no license to practice medicine who shall so prescribe or fit lenses shall be punished in the same manner as is prescribed for the practice of medicine without a license.

Art. 4552-5.06. Spectacles as premiums

It shall be unlawful for any person in this state to give, or cause to be given, deliver, or cause to be delivered,

in any manner whatsoever, any spectacles or eyeglasses, separate or together, as a prize or premium, or as an inducement to sell any book, paper, magazine or any work of literature or art, or any item of merchandise whatsoever.

Art. 4552-5.07. Prescribing without examination

No licensed optometrist shall sign, or cause to be signed, a prescription for an ophthalmic lens without first making a personal examination of the eyes of the person for whom the prescription is made.

Art. 4552-5.11. Window displays and signs

(a) It shall be unlawful for any optometrist:

(1) to display or cause to be displayed any spectacles, eyeglasses, frames or mountings, goggles, lenses, prisms, contact lenses, eyeglass cases, ophthalmic material of any kind, optometric instruments, or optical tools or machinery, or any merchandise or advertising of a commercial nature in his office windows or reception rooms;

(2) to make use of or permit the continuance of any colored or neon lights, eyeglasses or eye signs, whether painted, neon, decalcomania, or any other either in the form of eyes or structures resembling eyes, eyeglass frames, eyeglasses or spectacles, whether lighted or not, or any other kind of signs or displays of a commercial nature in

* * *

Art. 4552-5.12. Basic competence

(a) In order to insure an adequate examination of a patient for whom an optometrist signs or causes to be

signed a prescription for an ophthalmic lens, in the initial examination of the patient the optometrist shall make and record, if possible, the following findings of the condition of the patient:

(1) Case History (ocular, physical, occupational and other pertinent information).

(2) Far point acuity, O.D., O.S., O.U., unaided; with old glasses, if available, and with new glasses, if any.

(3) External examination (lids, cornea, sclera, etc.).

(4) Internal ophthalmoscopic examination (media, fundus, etc.).

(5) Static retinoscopy, O.D., O.S.

(6) Subjective findings, far point and near point.

(7) Phorias or ductions, far and near, lateral and vertical.

(8) Amplitude or range of accommodation.

(9) Amplitude or range of convergence.

(10) Angle of vision, to right and to left.

(b) Every prescription for an ophthalmic lens shall include the following information: interpupillary distance, far and near; lens prescription, right and left; color or tint; segment type, size and position; the optometrist's signature.

(c) The willful or repeated failure or refusal of an optometrist to comply with any of the foregoing requirements shall be considered by the board to constitute prima facie evidence that he is unfit or incompetent by reason of negligence within the meaning of Section 4.04

(a)(3) of this Act,¹ and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instances in which it is alleged that the rule was not complied with. At a hearing pursuant to the filing of such charges, the person charged shall have the burden of establishing that compliance with the rule in each instance in which proof is adduced that it was not complied with was not necessary to a proper examination of the patient in that particular case.

Art. 4552-5.13. Professional responsibility

(a) The provisions of this section are adopted in order to protect the public in the practice of optometry, better enable members of the public to fix professional responsibility, and further safeguard the doctor-patient relationship.

(b) No optometrist shall divide, share, split, or allocate, either directly or indirectly, any fee for optometric services or materials with any lay person, firm or corporation, provided that this rule shall not be interpreted to prevent an optometrist from paying an employee in the regular course of employment, and provided further, that it shall not be construed as a violation of this Act for any optometrist to lease space from an establishment on a percentage or gross receipts basis or to sell, transfer or assign accounts receivable.

(c) No optometrist shall divide, share, split or allocate, either directly or indirectly, any fee for optometric services or materials with another optometrist or with a physician except upon a division of service or responsibility provided that this rule shall not be interpreted to prevent partnerships for the practice of optometry. This

Act does not prohibit an optometrist from being employed on a salary, with or without bonus arrangements, by a licensed optometrist or physician, regardless of the amount of supervision exerted by the employing optometrist or physician over the office in which the employed optometrist works, provided such bonus arrangements, if any, shall not be based in whole or in part on the business or income of any optical company.

(d) No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas; provided, however, that optometrists practicing as partners may practice under the full or last names of the partners. Optometrists who are employed by other optometrists shall practice in their own names, but may practice in an office listed under the name of the individual optometrist or partnership of optometrists by whom they are employed. In event of the death or retirement of a partner, the surviving partner or partners practicing optometry in a partnership name may, with the written permission of the retiring partner or the deceased optometrist's widow or other legal representative, as the case may be, continue to practice with the name of the deceased partner in the partnership name for a period not to exceed one year from the date of his death, or during the period of administration of a deceased partner's estate as provided by Section 4.04(f) of this Act,¹ whichever period shall be longer.

(e) No optometrist shall use, cause or allow to be used, his name or professional identification, as authorized

by Article 4590e, as amended, Revised Civil Statutes of Texas, on or about the door, window, wall, directory, or any sign or listing whatsoever, of any office, location or place where optometry is practiced, unless said optometrist is actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

(f) No optometrist shall practice or continue to practice optometry in any office, location or place of practice where any name, names or professional identification on or about the door, window, wall, directory, or any sign or listing whatsoever, or in any manner used in connection therewith, shall indicate or tend to indicate that such office, location or place of practice is owned, operated, supervised, staffed, directed or attended by any person not actually present and practicing optometry therein during the hours such office, location or place of practice is open to the public for the practice of optometry.

(g) The requirement of Subsections (e) and (f) of this section that an optometrist be "actually present" in an office, location or place of practice holding his name out to the public shall be deemed satisfied if the optometrist is, as to such office, location or place of practice, either:

(1) physically present therein more than half the total number of hours such office, location, or place of practice is open to the public for the practice of optometry during each calendar month for at least nine months in each calendar year; or

(2) physically present in such office, location, or place of practice for at least one-half of the time such person conducts, directs, or supervises any practice of optometry.

(h) Nothing in this section shall be interpreted as requiring the physical presence of a person who is ill, injured, or otherwise incapacitated temporarily.

(i) The requirement of Subsections (e) and (f) of this section that an optometrist be "practicing optometry" at an office, location, or place of practice holding his name out to the public shall be deemed satisfied if the optometrist regularly makes personal examination at such office, location, or place of practice of the eyes of some of the persons prescribed for therein or regularly supervises or directs in person at such office location or place of practice such examinations.

(j) The willful or repeated failure or refusal of an optometrist to comply with any of the provisions of this section shall be considered by the board to constitute prima facie evidence that such optometrist is guilty of violation of this Act, and shall be sufficient ground for the filing of charges to cancel, revoke or suspend his license. The charges shall state the specific instance or instances in which it is alleged that the rule was not complied with. Alternatively, or in addition to the above, it shall be the duty of the board to institute and prosecute an action in a court of competent jurisdiction to restrain or enjoin the violation of any of the preceding rules.

Art. 4552-5.14. Lease of premises from mercantile establishment

(a) In order to safeguard the visual welfare of the public and the optometrist-patient relationship, fix professional responsibility, establish standards of professional surroundings, more nearly secure to the patient the optometrist's undivided loyalty and service, and carry out

the prohibitions of this Act against placing an optometric license in the service or at the disposal of unlicensed persons, the provisions of this section are applicable to any optometrist who leases space from and practices optometry on the premises of a mercantile establishment.

(b) The practice must be owned by a Texas-licensed optometrist. Every phase of the practice and the leased premises shall be under the exclusive control of a Texas-licensed optometrist.

(c) The prescription files and all business records of the practice shall be the sole property of the optometrist and free from involvement with the mercantile establishment or any unlicensed person. Except, however, that those business records essential to the successful initiation or continuation of a percentage of gross receipts lease of space may be inspected by the applicable lessor.

(d) The leased space shall be definite and apart from the space occupied by other occupants of the premises. It shall be separated from space used by other occupants of the premises by solid, opaque partitions or walls from floor to ceiling. Railings, curtains, and other similar arrangements are not sufficient to comply with this requirement.

(e) The leased space shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. The aisle of a mercantile establishment does not comply with this requirement. An entrance to the leased space is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.

(f) No phase of the optometrist's practice shall be conducted as a department or concession of the mer-

cantile establishment; and there shall be no legends or signs such as "Optical Department," "Optometrical Department," or others of similar import, displayed on any part of the premises or in any advertising.

(g) The optometrist shall not permit his name or his practice to be directly or indirectly used in connection with the mercantile establishment in any advertising, displays, signs, or in any other manner.

(h) All credit accounts for patients shall be established with the optometrist and not the credit department of the mercantile establishment. However, nothing in this subsection prevents the optometrist from thereafter selling, transferring, or assigning any such account.

(i) Any optometrist practicing optometry on or after April 15, 1969, in a manner, or under conditions, contrary to any of the provisions of this Section 5.14 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.14 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

Art. 4552-5.15. Relationships with dispensing opticians

(a) The purpose of this section is to insure that the practice of optometry shall be carried out in such a manner that it is completely and totally separated from the business of any dispensing optician, with no control of

one by the other and no solicitation for one by the other, except as hereinafter set forth.

(b) If an optometrist occupies space for the practice of optometry in a building or premises in which any person, firm, or corporation engages in the business of a dispensing optician, the space occupied by the optometrist shall be separated from the space occupied by the dispensing optician by solid partitions or walls from floor to ceiling. The space occupied by the optometrist shall have a patient's entrance opening on a public street, hall, lobby, corridor, or other public thoroughfare. An entrance is not a patient's entrance within the meaning of this subsection unless actually used as an entrance by the optometrist's patients.

(c) An optometrist may engage in the business of a dispensing optician, own stock in a corporation engaged in the business of a dispensing optician, or be a partner in a firm engaged in the business of a dispensing optician, but the books, records, and accounts of the firm or corporation must be kept separate and distinct from the books, records, and accounts of the practice of the optometrist.

(d) No person, firm, or corporation engaged in the business of a dispensing optician, other than a licensed optometrist or physician, shall have, own, or acquire any interest in the practice, books, records, files, equipment, or materials of a licensed optometrist, or have, own, or acquire any interest in the premises or space occupied by a licensed optometrist for the practice of optometry other than a lease for a specific term without retention of the present right of occupancy on the part of the dispensing optician. In the event an optometrist or physician who

is also engaged in the business of a dispensing optician (whether as an individual, firm, or corporation) does own an interest in the practice, books, records, files, equipment or materials of another licensed optometrist, he shall maintain a completely separate set of books, records, files, and accounts in connection therewith. Any optometrist practicing optometry on or after April 15, 1969 in a manner, or under conditions, contrary to any of the provisions of this Section 5.15 by virtue of occupying premises under an existing or negotiated lease in effect on April 15, 1969, shall not be subject to the provisions of this Section 5.15 until the expiration of the primary term of the lease, or until January 1, 1979, whichever occurs sooner, but no such lease may be extended beyond the primary term by the exercise of any option. Provided, however, that as to any such lease expiring on or before June 1, 1970, such lease may be continued in effect until June 1, 1970.

(e) If, after examining a patient, an optometrist believes that lenses are required to correct or remedy any defect or abnormal condition of vision, the optometrist shall so inform the patient and shall expressly state that the patient has two alternatives for the preparation of the lenses according to the optometrist's prescription: First, that the optometrist will prepare or have the lenses prepared according to the prescription; and second, that the patient may have the prescription filled by any dispensing optician (not naming or suggesting any particular dispensing optician) but should return for an optometrical examination of the lenses. If the patient chooses the first alternative, the optometrist may refer the patient to a particular dispensing optician for selection of frames and filling the prescription.

(f) If any person, on visiting the premises of any dispensing optician without presenting a prescription written by a licensed physician or optometrist, makes any inquiry or request concerning an examination or the obtaining of any ophthalmic materials or services requiring such a prescription, then the optician or his agent or employee may not respond in any manner except to state in effect that the optician cannot examine the patient or prescribe or fit glasses or lenses, but that the patient seeking such service must go to a licensed physician or optometrist. If there is no further inquiry from the prospective patient, the optician or his agent or employee may not make any further statement of any kind. If, however, the prospective patient makes an inquiry as to where or to whom he may go to obtain such service, the optician or his agent or employee shall give the prospective patient the names and addresses of at least three persons, each of whom is either a licensed ophthalmologist or a licensed optometrist whose practice is located within a radius of five miles from the optician's place of business, or if there are fewer than three of these, the name and address of each licensed ophthalmologist or licensed optometrist whose practice is so located.

B-1

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL ACTION NO. B-75-277-CA

DR. N. JAY ROGERS

v.

DR. E. RICHARD FRIEDMAN, ET AL

ORDER PENDENTE LITE

Section 5.13(d) of the Texas Optometry Act, which prohibits an optometrist from practicing under a name other than the name under which he is licensed, is the subject of a direct constitutional attack in this case.

Plaintiff's office at 907 Congress Avenue, Austin, Texas, becomes subject to the prohibition of § 5.13(d) during the pendency of this suit. To avoid the substantial irrevocable expense and disruption attendant to converting such office so as to conform to the mandate of § 5.13 (d), it is accordingly

ORDERED that the office of Texas State Optical at 907 Congress Avenue, Austin, Texas, is hereby declared exempt from the prohibitions of § 5.13(d) and like "trade name" prohibitions of the Texas Optometry Act until

B-2

60 days after a final judgment is rendered by this court herein, or pending further order of the Court.

DONE this 16th day of February, 1976.

/s/ JOE J. FISHER
United States District Judge

APPROVED AS TO FORM
AND SUBSTANCE:

/s/ ROBERT Q. KEITH
Robert Q. Keith
Attorney for Plaintiff

/s/ ROBERT L. OLIVER
Robert L. Oliver
Attorney for Defendant

Civ. Order Book
Vol. 172, Page 243